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Nos. 10589, 10590, 10591, 10592

Vol

United States Circuit Court of Appeals

For the Ninth Circuit.

2370

No. 10589

NEW IDRIA QUICKSILVER MINING COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10590

KLAU MINE, INC., a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10591

OAT HILL MINE, INC., a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10592

WILD HORSE QUICKSILVER MINING CO., a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcripts of the Record

Upon Petitions to Review Decisions of the Tax Court of the United States

Rotary Colorprint, 590 Folsom St., San Francisco

Nos. 10589, 10590, 10591, 10592

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ROBERT M. SEARLS, ESQ.,
JOHN F. GRIEDER, C.P.A.

For Comm'r:

HARRY R. HORROW, ESQ.,

Docket No. 112386.

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1942

Sept. 8—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 9—Copy of petition served on General Counsel.

Sept. 8—Request for Circuit hearing in San Francisco, filed by taxpayer. 9-9-42 Granted.

Oct. 16—Answer filed by General Counsel.

Oct. 16—Request for Circuit hearing in San Francisco, filed by General Counsel.

Oct. 19—Copy of answer and request served on taxpayer. San Francisco, Calif.

1943

Jan. 5—Hearing set Feb. 1, 1943 in San Francisco, California.

Jan. 16—Motion for leave to file amended answer, amended answer lodged, filed by General Counsel.

Jan. 20—Hearing set 2-1-43 on motion.

Feb. 4—Hearing had before Judge Smith on merits. Submitted. Motion of respondent for leave to file amended answer—granted. Amended answer filed. Dkts. 112386, 87, 88, and 89 consolidated. Stipulation of Facts filed. Petitioner's brief due 3-20-43. Respondent's brief 4-20-43. Reply brief 5-5-43.

Feb. 24—Transcript of hearing 2-4-43 filed.

Mar. 15—Brief filed by taxpayer. 3-15-43 Copy served on General Counsel.

Apr. 20—Reply brief filed by General Counsel. Served 4-21-43.

Apr. 29—Order granting extension to May 20, 1943 to file reply brief, entered.

May 17—Reply brief filed by taxpayer. 5-17-43 Copy served.

Jul. 14—Findings of Fact and opinion rendered. Judge Smith, Div. 5. Decision will be entered under Rule 50. 7-14-43 Copy served.

Aug. 10—Computation of deficiency filed by General Counsel.

Aug. 10—Consent to settlement filed by taxpayer (letter).

1943

Aug. 13—Decision entered. Smith, Judge. Div. 5.

Aug. 28—Motion to fix the amount of bond in the sum of $20,000.00 filed by taxpayer.

Sept. 6—Order fixing amount of bond in the amount of $20,000.00 entered.

Oct. 12—Bond in the amount of $20,000.00 approved and ordered filed.

Oct. 12—Petition for review by U. S. Circuit Court of Appeals 9th Circuit, with assignments of error filed by taxpayer.

Oct. 12—Proof of Service filed by taxpayer.

Oct. 12—Agreed statement of evidence filed.

Oct. 12—Agreed praecipe filed.

Oct. 12—Proof of service of praecipe filed. [1*]

United States Board of Tax Appeals

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for redetermination of the deficiency set forth by the

*Page numbering appearing at top of page of original certified Transcript of Record.

Commissioner of Internal Revenue in his Notice of Deficiency under the following symbols: I R A: 90-D-C W B: C: T S: P D: S F: M W B; dated June 30, 1942 and as a basis of this proceeding alleges as follows:

1. At all times herein mentioned New Idria Company was and is now, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, having its principal office and place of business in California, at the office of H. W. Gould & Co., 220 Montgomery Street, San Francisco, California. [2]

2. The Notice of Deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to petitioner on the 30th day of June, 1942.

3. Taxes in controversy are corporation income taxes for the taxable years ended June 30, 1939, 1940 and 1941 and in the amount of $10,143.16.

4. The determination of additional tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner has erred in computing the allowable depletion of the properties owned by petitioner for each fiscal year in question.

(b) The Commissioner has erred in his statement that the allowable depletion for each of the fiscal years in question has been based by him on 15% of the gross income from the property as used in United States Revenue Code Section 114-b.

(c) The Commissioner has erred in failing to determine the fair market value of the first marketable product from petitioner's mine as constituting

the gross income basis for the purpose of computing the percentage depletion under the provisions of Regulation 103 of the Bureau of Internal Revenue, section 1923 (m)-1, for each of the fiscal years in question.

(d) The Commissioner has erred in not accepting as the gross income from the property, as a basis for computing percentage depletion allowance to petitioner, the gross return from sales of mercury derived from this property in the amount of $323,018.72 for the fiscal year 1939, $597,813.50 for the fiscal year 1940, and $901,717.45 for the fiscal year 1941, which was returned by petitioner as constituting gross income from the property for the purpose of computing percentage [3] depletion for the respective years in question.

(e) The Commissioner has erred in deducting from the gross income from sales of quicksilver derived from petitioner's property during each of the years in question, the amounts claimed by Commissioner or any other amounts as truly representing the cost of furnacing (including the cost of condensing, cleaning and flasking) metal extracted from quicksilver ore mined and extracted from petitioner's property.

(f) The Commissioner has erred in subtracting from the gross income to petitioner from sales of quicksilver metal from petitioner's property during each of the fiscal years in question, the amount claimed by the Commissioner, or any other amount, as representing the proportion of petitioner's operating profit alleged to have been derived from

furnacing of quicksilver ore mined and extracted from petitioner's property (including the condensing, cleaning and flasking the metal contained in said ore).

(g) The Commissioner has erred in assuming as the basis for said deductions specified in assignments Nos. (e) and (f) that quicksilver ore was the first marketable product derived from petitioner's operations, whereas, in fact, quicksilver metal was and is the first marketable product derived from said operations.

(h) The Commissioner erred in assuming as a basis for said deduction No. (f) that any profit whatever was derived by petitioner from the furnacing, cleaning, condensation, flasking or transportation of said quicksilver so mined and extracted from petitioner's property during the period in question, instead of assuming that the profit in question was ascribable wholly to the existence of quicksilver ore in petitioner's mine, and of an open market for the metal extracted therefrom by said process.

(i) The Commissioner erred in assuming that either the gross income from the property or the [4] gross value of the first marketable product therefrom can be ascertained by adding to the cost of mining and crushing the ore a percentage of the net profit from sales equal to the proportion that the cost of mining and crushing bore to the total cost of mining, crushing, furnacing, condensing, cleaning, flasking and transporting the metal to market and all other costs of operation.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner's gross income for the fiscal years in question was derived entirely from the sale of quicksilver metal mined and extracted from the New Idria Mine in San Benito County, California and amounted to $323,018.72 for the fiscal year 1939; $597,813.50 for the fiscal year 1940 and $901,717.45 for the fiscal year 1941. Petitioner's net income from its said operations as disclosed by its return for said taxable years before depletion deduction was $18,018.06 for the fiscal year 1939; $188,009.20 for the fiscal year 1940 and $244,353.60 for the fiscal year 1941. After computing said net returns petitioner deducted as allowable depletion of a metal mine under section 114 (b) 4 of the Internal Revenue Code, the sums of $9,009.03 for the fiscal year 1939; $89,672.03 for the fiscal year 1940, and $121,759.21 for the fiscal year 1941, which deductions were obtained by taking 15% of the gross income from the property as stated above for each year and where the result exceeded 50% of the net income prior to taking depletion, reducing the allowance to 50% net income.

(b) All of said gross income was derived from sales of quicksilver metal extracted from petitioner's New Idria Mine in San Benito County, California, and said metal was obtained by mining, transporting to the surface, sorting, crushing, and roasting cinnabar or quicksilver ore contained in said property in mine workings and in a furnacing plant situated on the property in [5] question; said

process of extracting the metal from said property was a continuous process and resulted in the extraction of the metal in vapor form from the ore in a furnace, whence the vapors were passed into condensers, condensed into liquid form in which quicksilver exists at normal temperatures, cleaned and poured in measured quantities into flasks. These flasks of quicksilver were transported to the market and sold.

(c) The cost of mining, sorting and crushing said quicksilver ore during said period was $248,202.85 for the fiscal year 1939, $322,047.87 for the fiscal year 1940, and $510,730.67 for the fiscal year 1941. The cost of furnacing said ore and condensing the mercury vapors derived from such operation, cleaning and storing the resultant liquid metal in flasks was $44,717.97 for the fiscal year 1939, $63,353.52 for the fiscal year 1940, and $113,932.05 for the fiscal year 1941. The cost of transporting said metal in said flasks to the market was $2,066.18 for the fiscal year 1939, $3,525.62 for the fiscal year 1940 and $4,688.57 for the fiscal year 1941.

(d) Petitioner is informed and believes and upon such information and belief alleges that in redetermining the petitioner's income tax for the fiscal years 1939, 1940 and 1941, the Commissioner determined the gross income basis for computing the percentage depletion deduction for each of said years by adding to the cost of mining and crushing the ore a percentage of net profit from sales equal to the proportion that the cost of mining and crushing bore to the total cost of mining, crushing, fur-

nacing, condensing, cleaning, flasking and transporting the metal to market and all other costs of operation. In so computing said gross income basis for depletion, the Commissioner in effect subtracted from the gross income from sales of metal mined and extracted from petitioner's mine during said period the cost of furnacing, condensing, cleaning, flasking and transporting said metal to market plus a percentage of profit arbitrarily assumed to be incident to said operations, leaving as the assumed gross income from the property only [6] the cost of mining and crushing the ore plus the remaining percentage of the net profit from metal sales determined as aforesaid. Petitioner alleges that said gross income basis assumed by the Commissioner was neither the gross income from the property nor the gross value at the mine of the first marketable product derived therefrom.

(e) The quicksilver ore or cinnabar as mined and extracted, sorted and crushed at petitioner's mine had no market nor market value and was not a marketable product for the reason that the percentage of quicksilver contained in said ore was so low that it would cost more to transport said ore to some point where it could be milled than the metal in the ore was worth. There are no custom mills or smelters in the United States who buy quicksilver ore either in its crude state or after sorting and crushing. The erection of a furnace, roasting of the ore, condensing the metal vapor and cleaning and pouring the liquid quicksilver into flasks is just as much a part of the extraction of the metal from

the mine in its first marketable form as is the operation of mining, breaking down and transporting the ore to the surface. The only form in which quicksilver is regularly marketed is in its liquid form, which is its natural condition at normal temperature, in metallic flask containers; the cost of furnacing, condensing, purifying the condensed vapors and storing the metal in flasks are all a part of the necessary cost of preparing the first marketable product from the mine, to-wit: quicksilver metal, for market. There is no such thing as a quicksilver concentrate or a quicksilver precipitate or any intermediate form of product which is marketable between the ore in place in the ground and the metal itself properly flasked for market.

(f) Petitioner's net profit realized from its mining operations during the years in question was prior to making any deduction for depletion allowance as alleged in para- [7] graph 5 (a) hereof. None of said profit was due to furnacing, condensing, purifying or flasking ore or metal in question. All of said profit, on the other hand, was due (1) to the existence of quicksilver ore in petitioner's property, and, (2) to a market value created for quicksilver by the laws of supply and demand in an open market. The cost of mining and treating the ore is a debit against profits which would be realized if the metal occurred in marketable form in its natural state in the mine. These costs had nothing whatever to do with the market price which determined the profit. There are no custom mills which make a profit from the beneficiation of quicksilver

ore as brought to the surface and no basis exists for the arbitrary assignment of a portion of the gross profit to the furnacing, condensing, flasking and marketing operations.

(g) Quicksilver is the only metal which exists in liquid form at normal temperatures and is one of the few metals whose ores have no market value in their crude form because of the low percentage of metal content as compared with the volume and weight of the waste products in the ore which have to be discarded in beneficiation. It is also one of the metals which do not pass through a concentrating process after preliminary crushing before being recovered in metallic form, that is, the metal is recovered on the premises, directly from the ore by the roasting process instead of through concentration.

By reason of the foregoing facts and specification of errors petitioner prays that this Board may hear this proceeding and grant petitioner an abatement of said additional assessment of taxes for each of the corporate years ending June 30, 1939, 1940, and 1941.

ROBERT M. SEARLS
Attorney for Petitioner
705 Standard Oil Bldg.
San Francisco, Calif.
JOHN F. GRIEDER (C.P.A.)
Tax Accountant for Petitioner
Mills Building,
San Francisco, Calif. [8]

State of California
City and County of San Francisco—ss.

H. W. Gould, being first duly sworn, says: that he is executive Vice President of petitioner corporation; that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true except those which are stated upon information and belief and that those he believes to be true.

H. W. GOULD

Subscribed and sworn to before me this 31st day of August, 1942

[Seal] MARIE FORMAN

Notary Public in and for the City and County of San Francisco, State of California [9]

SN-IT-1

EXHIBIT A

TREASURY DEPARTMENT

Internal Revenue Service
74 New Montgomery Street
San Francisco, California
Jun 30 1942

San Francisco Division
IRA:90-D-CWB
(C:TS:PD
SF:MWB)
New Idria Quicksilver Mining Company,
No. 10 Pent House, Mills Building,
San Francisco, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year(s) 1939, 1940 and 1941 discloses a deficiency of $10,143.16 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, California for the attention of —Confer-

ence Section—. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
By
/s/ F. M. HARLESS
Internal Revenue Agent in
Charge.

Enclosures:
Statement.
Form of waiver.
H.E.A.
Exhibit A [10]

(Copy)

STATEMENT

San Francisco
IRA:90-D
CWB
(C:TS:PD
SF:MWB)

New Idria Quicksilver Mining Company,
No. 10 Pent House, Mills Building
San Francisco, California.

Tax liability for the Taxable Years Ended June 30, 1939, June 30, 1940 and June 30, 1941.

Year Ended	Income Tax Liability	Assessed	Deficiency
June 30, 1939	$ 1,374.60	$ 1,186.26	$ 188.34
June 30, 1940	19,640.06	16,225.74	3,414.32
June 30, 1941	35,862.93	29,322.43	6,540.50
Total	$56,877.59	$46,734.43	$10,143.16

In making this determination of your income tax liability, careful consideration has been given to your protest of November 24, 1941, covering the fiscal year 1940 and to the statements made at the conferences held on December 3, 1941 and April 22, 1942.

A copy of this letter and statement has been mailed to your representative, Mr. John F. Grieder, Mills Building, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJSTMENTS TO NET INCOME

Year ended June 30, 1939

Net income as disclosed by return	$ 9,009.03
Unallowable deductions and additional income:	
(a) Excessive depletion	1,345.22
Net income adjusted	$10,354.25

[11]

EXPLANATION OF ADJUSTMENTS

(a) In your income and excess-profits tax return filed for the fiscal year ended June 30, 1939, there was claimed a deduction for depletion the sum of $9,009.03. Allowable depletion, based on 15 percent of the gross income from the property as defined in the law and regulations, has been redetermined in the amount of $7,663.81 and taxable income is accordingly increased by the amount of $1,345.22.

COMPUTATION OF TAX

Year ended June 30, 1939

Declared Value Excess-profits Tax:	
Taxable net income	$ 10,354.25
Less: 10 percent of $1,500,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1938	150,000.00
Net income subject to declared value excess-profits tax	None
Declared Value excess-profits tax	None
Declared Value excess-profits tax assessed	None

[12]

COMPUTATION OF TAX

Year ended June 30, 1939—(Continued)

Income Tax:		
Net income for declared value excess-profits tax computation		$ 10,354.25
Less: Declared value excess-profits tax		None
Adjusted net income		$ 10,354.25
Dividends received credit		None
Balance subject to income tax		$ 10,354.25
Portion (not in excess of $5,000) taxable at 12½% —$5,000.00		625.00
Portion (in excess of $5,000 and not in excess of $20,000) taxable at 14%—$5,354.25		$ 749.60
Taxable income tax assessable		$ 1,374.60
Income tax assessed:		
Original, Sept. 1939—Account No. 410039—First California District		1,186.26
Deficiency of income tax		$ 188.34

ADJUSTMENTS TO NET INCOME

Year ended June 30, 1940

Net income as disclosed by return		$ 98,337.77
Unallowable deductions and additional income:		
(a) Depletion disallowed	$18,469.67	
(b) Depreciation disallowed	1,034.99	19,504.66
Net income adjusted		$117,842.43

[13]

EXPLANATION OF ADJUSTMENTS

(a) In your income and excess-profits tax return filed for the fiscal year ended June 30, 1940, there was claimed as a deduction for depletion the

sum of $89,672.03. Allowable depletion, based on 15 percent of the gross income from the property as defined in the law and regulations, has been redetermined in the amount of $71,202.36 and taxable income is accordingly increased by the amount of $18,469.67.

(b) In your return you included in the deduction for depreciation the amount of $3,216.67 on the assets shown in Exhibit A. It is held that $2,181.68 is a reasonable allowance for depreciation of these assets during the taxable year. Your income is accordingly increased by $1,034.99.

COMPUTATION OF TAX

Year ended June 30, 1940

Declared Value Excess-profits Tax:		
Taxable net income		$117,842.43
Less:		
10 percent of $1,519,017.06 value of capital stock as declared in your capital stock tax return for year ended June 30, 1939		151,901.71
Net income subject to declared value excess-profits tax	None	
Declared value excess-profits tax	None	
Declared value excess-profits tax assessed	None	

[14]

Income Tax:		
Net income for declared value excess-profits tax computation		$117,842.43
Less: Declared value excess-profits tax	None	
Adjusted net income		$117,842.43
Tentative tax at 19 percent		$ 22,390.06

COMPUTATION OF TAX

Year ended June 30, 1940—(Continued)

Less: 2½ percent of the dividends paid credit $110,000.00 (not to exceed 2½ percent of adjusted net income)	2,750.00
Total income tax assessable	$ 19,640.06
Income tax assessed:	
Original, Sept. 1940—Account No. 400036—First California District	16,225.74
Deficiency of income tax	$ 3,414.32

ADJUSTMENTS TO NET INCOME

Year ended June 30, 1941

Net income as disclosed by return		$121,759.22
Unallowable deductions and additional income:		
(a) Excessive depletion	$26,834.50	
(b) Excessive depreciation	45.92	
(c) Sale of equipment	728.15	
(d) Interest paid	61.10	27,669.67
Net income adjusted		$149,428.89

[15]

Explanation of Adjustments

(a) In your income and excess-profits tax return, Form 1120, filed for the fiscal year ended June 30, 1941, there was claimed as a deduction for depletion the sum of $121,759.21. Allowable depletion, based on 15 percent of the gross income from the property as defined in the law and regulations, has been redetermined in the amount of $94,924.71 and taxable income is accordingly increased by the amount of $26,834.50.

(b) In your return you claim a deduction in the amount of $20,754.55 for depreciation. It is

held that $20,708.63, the deduction as claimed in your amended return, is a reasonable allowance for depreciation for the taxable year. Your income is accordingly increased by $45.92.

(c) In your amended return you report income in the amount of $728.15 from the sale of spare equipment. Since this income is not included in your original return your taxable income is increased by $728.15.

(d) In your return you claim a deduction in the amount of $779.27 for interest. The information submitted in your amended return indicates that $718.17 is the correct deduction for interest paid or accrued during the taxable year. The net income reported in your return is therefore increased by $61.10.

COMPUTATION OF TAX

Year ended June 30, 1941

Declared Value Excess-profits Tax:	
Taxable net income	$149,428.89
Less: 10 percent of $3,000,000.00 value of capital stock as declared in your capital stock tax return for year ended June 30, 1940	300,000.00
Net income subject to declared value excess-profits tax	None
Total declared value excess-profits tax	None
Declared value excess-profits tax assessed	None

[16]

COMPUTATION OF TAX

Year ended June 30, 1941

Income Tax:		
Net income for declared value excess-profits tax computation		$149,428.89
Less: Declared value excess-profits tax		None
Normal tax net income		$149,428.89
Income tax 22.1 percent of $149,428.89		$ 33,023.78
Income defense tax 1.9 percent of $149,428.89		2,839.15
Total income and income defense taxes assessable		$ 35,862.93
Income tax assessed:		
Original Sept. 1941 list, Account No. 410065—First California District	$29,222.21	
Additional Oct. 1941 list, amended return—Account No. 410701	100.22	$ 29,322.43
Deficiency of income and income defense taxes		$ 6,540.50

[17]

EXHIBIT A

DEPRECIATION SCHEDULE

Assets acquired July 3, 1936	Cost	Depreciation to June 30, 1939	Remaining Cost	Remaining Life	Year ended June 30, 1940 Depreciation Claimed	Allowed
Compressor House Contents	$ 1,050.00	$ 560.00	$ 490.00	3 years	$ 210.00	$ 163.33
Mechanical Shops	750.00	450.00	300.00	3 years	150.00	100.00
Generator Shed	3,750.00	1,875.00	1,875.00	3 years	750.00	625.00
Store Building	500.00	300.00	200.00	3 years	100.00	66.67
Fuel Oil Tanks and Lines	200.00	120.00	80.00	3 years	40.00	26.67
Reduction Plant Building	5,000.00	3,000.00	2,000.00	3 years	1,000.00	666.67
2-Insley 3/8 yd. shovels	2,000.00	999.99	1,000.01	3 years	666.67	333.34
Camp Buildings	1,500.00	900.00	600.00	3 years	300.00	200.00
Total	$14,750.00	$8,204.99	$6,545.01		$3,216.67	$2,181.68
Depreciation claimed						3,216.67
Depreciation allowed						2,181.68
Excessive depreciation						$1,034.99

[Endorsed] U.S.B.T.A. Filed Sept. 8, 1942. [18]

The Tax Court of the United States

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AMENDED ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed by the above-named petitioner admits, denies and alleges as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition; alleges that the deficiencies asserted by the Commissioner in his notice of deficiency are income taxes in the respective amounts of $188.34 and $3,414.32 for the fiscal years ended June 30, 1939, and June 30, 1940; and $6,540.50 income and defense taxes for the fiscal year ended June 30, 1941, and that all of said taxes are in controversy, together with the following amounts of increased deficiencies claimed by the respondent: [19]

Fiscal year ended June 30	Tax	Increased Deficiency
1939	Income	$ 37.71
1940	Income	1,718.78
1941	Income and defense	3,339.44

4(a) to (i), inclusive. Denies that the Commissioner erred as alleged in subparagraphs (a) to (i), inclusive, of paragraph 4 of the petition.

5(a) to (g), inclusive. Denies the allegations contained in subparagraphs (a) to (g), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

7. Further answering and by way of asserting a claim for increased deficiencies respondent alleges as follows:

(a) During the fiscal years ended June 30, 1939; June 30, 1940; and June 30, 1941, petitioner sold quicksilver which was extracted from ores and other materials which were not crude ores in place mined by petitioner, in which petitioner had an economic interest. Said ores and materials consisted of (1) crude low-grade ores which were mined by the owners and operators of petitioner's mining property prior to its acquisition by petitioner, and deposited by them on the surface of said property; and (2) the ores which were so mined and were processed by furnacing operations by the owners and operators of the property prior to [20] its acquisition by petitioner and deposited by them on the surface of said property.

(b) In arriving at the deficiencies involved in this proceeding, the Commissioner erroneously determined that all of the quicksilver sold by petitioner during the taxable years in question had been extracted from crude ores in place mined by petitioner from its mining property. In the notice of deficiency in respect of which the petition herein has been filed, the Commissioner erroneously allowed petitioner deductions for percentage depletion as follows:

Fiscal year ended June 30	Amount
1939	$ 7,663.81
1940	71,202.36
1941	94,924.70

(c) During the taxable years in question, the petitioner realized gross proceeds from the sale of quicksilver extracted from ores and materials which were not crude ores in place mined by petitioner as follows:

Fiscal year ended June 30	Amount
1939	$ 57,844.18
1940	80,700.00
1941	110,489.70

Respondent erroneously failed to exclude said amounts of said sales and costs incurred by petitioner during said years allocable thereto in determining the deductions for percentage depletion [21] for the taxable years in question allowed to petitioner in the deficiency notice.

(d) The gross income realized by petitioner during the taxable years in question from its mining

property, for purposes of computing percentage depletion, was as follows:

Fiscal year ended June 30	Gross Income
1939	$223,393.93
1940	423,146.35
1941	634,898.87

The net income realized by petitioner therefrom for said taxable years, for purposes of computing percentage depletion, was as follows:

Fiscal year ended June 30	Net Income
1939	$ 14,788.87
1940	131,732.10
1941	162,020.80

(e) Fifteen per centum of said gross income, not to exceed fifty per centum of said net income, for each of the taxable years in question is as follows:

Fiscal year ended June 30	Amount
1939	$ 7,394.43
1940	63,471.95
1941	81,010.40

[22]

Said amounts are the amounts of percentage depletion allowable to petitioner for each of the taxable years in question, and respondent erroneously understated petitioner's taxable net income by excessive deductions for percentage depletion for each of said years allowed in the deficiency notice as follows:

Fiscal year ended June 30	Amount
1939	$ 269.38
1940	7,730.41
1941	13,914.31

(f) By reason of the foregoing erroneous allowances for percentage depletion during the taxable years in question respondent erroneously determined that there were due from petitioner the deficiencies set forth in the notice of deficiency instead of the following deficiencies which are due:

Fiscal year ended June 30	Tax	Amount
1939	Income	$ 226.05
1940	Income	5,133.10
1941	Income and defense	9,879.94

Wherefore, it is prayed that petitioner's appeal be denied and that there be found to be due from this petitioner the deficiencies determind in the notice of deficiency plus additional amounts of income taxes for the fiscal years 1939 and 1940 and income and defense taxes for the fiscal year 1941 as follows: [23]

Fiscal year ended June 30	Increased Deficiency
1939	$ 37.71
1940	1,718.78
1941	3,339.44

Claim for said increased deficiencies is hereby asserted, or such lesser increased amounts as the Court may find to be due by reason of any errors that may have been committed by the Commissioner.

(Signed) J. P. WENCHEL
A.C.B.
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
Alva C. Baird,
Division Counsel;

T. M. Mather,
Harry R. Horrow,
Special Attorneys,
Bureau of Internal Revenue.

HRH:sob 1/12/43.

[Endorsed]: T.C.U.S. Filed Feb. 4, 1943. [24]

The Tax Court of the United States

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a Nevada corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto that the following facts shall be taken to be true in the above-entitled proceeding and received as evidence therein:

1. Petitioner is a corporation, organized under the laws of the State of Nevada on July 3, 1936, with its principal office and place of business at No.

10 Penthouse, Mills Biulding, San Francisco, California.

2. Petitioner kept its books of account and filed its Federal income tax returns on the accrual basis and on the basis of a fiscal year ending June 30. Petitioner filed its Federal income and declared-value excess profits tax returns for the fiscal years ended June 30, 1939, June 30, 1940, and June 30, 1941, with the Collector of Internal Revenue for the First District of California, at San Francisco, California. [25]

3. Since its incorporation and thereafter throughout the taxable years in question, the petitioner owned in fee certain mining property located southeast of Hollister, in San Benito County, California. Said property included a quicksilver mine, plant and equipment for the extraction of quicksilver.

4. During the taxable years in question, petitioner realized gross proceeds from sales of quicksilver in flasks as follows:

Fiscal Year	Amount
Ended June 30, 1939	$323,018.72
" " 30, 1940	$597,813.50
" " 30, 1941	$901,717.45

5. Said quicksilver was extracted from crude ores mined from said property by petitioner, containing cinnabar, a chemical compound of mercuric sulphide and from low-grade dump ores, and ores containing cinnabar which had been mined and processed by former owners and operators of petitioner's mining property. All of said owners and

operators were predecessors in interest of petitioner, in the title to said property, and none of them were stockholders of or otherwise interested in the organization or ownership of the petitioner corporation.

6. During the years in question, the crude ores, containing cinnabar, which were mined by petitioner, were extracted from subterranean workings developed by drifts and crosscuts, the ores being broken by blasting and thereafter sorted. The ore which did not contain cinnabar was discarded and the remainder hauled to the surface by cars. Said crude ores were screened and crushed [26] into small particles of 2 inches or less and hauled by conveyor to two furnaces located on petitioner's property.

7. Said furnaces are made of iron, lined with firebrick, and are cylindrical in shape, five feet in diameter and fifty-six feet in length. The furnaces are of a rotary type, revolving at a speed of about one revolution per minute.

8. The crushed ores are fed into said furnaces which are heated at the opposite ends to a temperature of some 1200° Fahr. As the ores pass through the furnaces the mercury contained in the cinnabar is freed from the sulphur by vaporizing. The gases containing the vaporized mercury are drawn off by means of suction fans at the feed end of the furnaces. Said gases thereupon pass into a condensing system, consisting of two banks of 16 inch cast iron pipes, 30 feet high, with 10 pipes per bank. At the bottom of the pipes there are rubber

buckets into which are deposited mercury and soot when the gases are condensed. The remaining gases leave the condensing system and pass into redwood tanks. The mercury and soot collected in the buckets are treated with lime, placed on a table, and worked with a hoe until as much mercury as possible is freed. The soot remaining after the hoeing process is refed into the furnaces. The mercury thus freed is collected in a pot, measured in metal containers, called flasks, which hold 76 pounds of mercury. These flasks are then transported by petitioner to San Francisco where they are sold.

9. During the taxable years in question, the gross sales realized by petitioner from the sale of quicksilver extracted from [27] crude ores mined by it, and the cost of mining, sorting, crushing and furnacing said ores, and condensing, cleaning and transporting the quicksilver obtained therefrom, as described in paragraphs 6 to 8, inclusive, are correctly shown on Exhibit A, attached to this stipulation.

10. During the taxable years in question there were located on petitioner's mining property large dumps of crude ores containing cinnabar which had been mined from the underground workings of the mining property owned by petitioner. Said ores were mined by the predecessors in interest of petitioner in the title of said property, prior to its acquisition by petitioner. Said dumps were created by mining operations which commenced in or about the year 1858 and continued practically without intermission up to the time that petitioner acquired

the properties in 1936. During the course of said mining operations extending over said period, dumps were built up on the surface of the mine premises at a point about a mile and one-half from petitioner's plant. Title to the land on which the dumps were situated, and to the land on which petitioner's plant is situated, was vested at all times since the creation of said dumps in one ownership, and title to said ownership passed continuously from owner to owner, through the years since said dumps were created, down to petitioner, who acquired the property in 1936 by purchase. At no time during said period was title to the dumps, or any right to work them, severed or separated by conveyance, lease, or otherwise from the title to land on which the mine whence the ore came is situated.

[28]

During the taxable years in question ores from said dumps were removed therefrom by power shovels by petitioner, placed in trucks, and transported to petitioner's plant located on the same property, where they were crushed, furnaced, and treated for the metal therein contained, as above described. Because the mining of ore in more recent years had been more efficient and the separation of ores more efficient, the superficial layers of said dumps consisted almost entirely of waste. In order to obtain the ores in said dumps from which quicksilver could be profitably extracted due to incomplete separation methods used in earlier mining of the property and to higher prices of quicksilver which prevailed during the years in question, peti-

tioner was compelled to and did remove by power shovel large quantities of waste on the top of said dumps before being able to remove the more valuable ore lying underneath in said dumps. The ores removed from said dumps, as aforesaid, were crushed, roasted, and the mercury vapors condensed, cleaned, flasked, and transported in identically the same manner as were the ones taken from the subterranean workings of the mine, as described in paragraph 6 of this stipulation.

11. During the taxable years in question there were located on petitioner's property ores containing cinnabar which had been mined from said property by the former owners thereof in the same manner as described in paragraph 10 hereof, and run through furnaces located thereon prior to the acquisition of the property by petitioner. Said so-called roasted cinnabar ores had been dumped [29] on the surface of the property owned by petitioner, and had been left on said property without any severance of title thereto, in the same manner as were the mine dump ores described in paragraph 10 of this stipulation. Petitioner removed said roasted cinnabar ores from said burned ore dumps by power shovels, fed them into its furnaces and extracted the mercury therefrom which had not been extracted by the older process used by petitioner's predecessors in interest, through utilization of the processes described in paragraphs 6 to 8, inclusive, of this stipulation. Due to the quantities of superficial waste which petitioner has been compelled to remove, both from the mine dumps and

the burned ore dump, and due to the ability of petitioner's manager to positively identify the ore and burned ore which is now being taken from said dumps as having been placed there at a time when former less efficient furnaces were in use, it is agreed that the ore taken from said dumps by petitioner during the years in question here, had been placed there prior to the year 1913, and that no previous claims for depletion thereof have previously been made in any income tax returns.

12. During the taxable years in question, the gross sales of the quicksilver extracted from the dump ores referred to in paragraph 10 above, and from the roasted cinnabar ores referred to in paragraph 11 hereof, and the costs of removing, sorting, crushing, and furnacing of said ores, and the condensing, cleaning and transportation of the mercury extracted therefrom, were as shown on Exhibit B attached hereto. [30]

13. In the petitioner's income and declared-value excess profits tax returns for the fiscal years ended June 30, 1939, 1940 and 1941, petitioner elected to claim percentage depletion and claimed and computed deductions for depletion in said returns as follows:

	1939	1940	1941
Gross Income from property	$323,018.72	$597,813.50	$901,717.45
15% of gross income	48.452.81	89.672.03	135,257.62
Net income (before depletion)	18,018.06	188,009.80	244,353.60
Depletion claimed	9,009.03	89,672.03	122,176.80

In computing said depletion deduction, petitioner assumed as the gross income from the property the gross proceeds from the sale of quicksilver derived therefrom, as shown in Paragraph 4 hereof, and made no segregation or deduction of returns from quicksilver obtained from ores removed from the dumps referred to in Paragraphs 10, 11, and 12 hereof.

14. In arriving at the deficiencies involved in this proceeding, respondent disallowed depletion for the fiscal years 1939, 1940, and 1941 in the respective amounts of $1,345.22; $18,469.67, and $26,834.50. Respondent allowed depletion for said years in the respective amounts of $7,663.81; $71,202.36; and $94,924.71. Said amounts of depletion were computed by respondent as shown on Exhibit "C" attached hereto.

15. By amended answer filed in this proceeding, respondent alleges that he erred in the deficiency notice in determining that the income attributable to the sale of quicksilver obtained from the dump ores and the roasted ores referred to in Paragraphs 10 [31] and 11 hereof, respectively, constituted gross income from the petitioner's mining property for purposes of percentage depletion. If the income obtained by petitioner from the sale of quicksilver during the years in question obtained from the dump ores referred to in Paragraphs 10 and 11 hereof were omitted from the gross income of petitioner for the purpose of computing depletion, and if the methods shown on Exhibit "C" hereto were used in computing the amount of allowable per-

centage depletion of petitioner's property for the years in question, the results would be as shown on Exhibit "D" attached hereto.

16. The right is reserved by each party hereto to introduce any additional evidence not contrary to the facts herein stipulated.

Dated: January 27th, 1943.

ROBERT M. SEARLS
705 Standard Oil Building,
San Francisco, California.
Attorney for Petitioner

JOHN F. GRIEDER
(C.P.A.)
Mills Building,
San Francisco, Cal.
Tax Accountant for
Petitioner

.....

(J. P. Wenchel)
Chief Counsel, Bureau of Internal Revenue.
Counsel for Respondent.

[32]

EXHIBIT A

Exhibit A (Excludes Dump Ores)

YEAR ENDED JUNE 30, 1939

(New Idria Quicksilver Mining Company)

I.	Gross Sales		$265,174.54
II.	Costs		
	1. Mining and sorting	$174,083.76	
	2. Crushing and screening	5,796.30	
	3. Depreciation pertaining to 1 and 2	4,374.45	
	4. General expenses allowable to items 1 and 2	23,815.52	
	Total	208,070.03	
	Add costs attributable to opening inventory	5,067.33	
		213,137.36	
	Deduct costs attributable to closing inventory	4,532.30	
	Cost items 1 to 4 as adjusted by inventory		$208,605.06
	5. Furnacing	20,006.03	
	6. Condensing	5,099.68	
	7. Cleaning, flasking and transportation	4,522.57	

Exhibit A—(Continued)

Year Ended June 30, 1939—(Continued)

II.	Costs—(Continued)			
	8. Depreciation allocable to items 5 to 7	1,996.36		
	9. General expenses allocable to items 5 to 7	5,107.87		
	Total	36,732.51		
	Add costs attributable to opening inventory	1,416.57		
		38,149.08		
	Deduct costs attributable to closing inventory	1,002.87		
	Costs, 5 to 9 as adjusted by inventory		37,146.21	
	Total costs, 1 to 9 inclusive			245,751.27
III.	Gross sales less items 1 to 9 inclusive			$ 19,423.27

Exhibit A—(Continued)

YEAR ENDED JUNE 30, 1940

I. Gross Sales			$517,113.14
II. Costs			
1. Mining and sorting	$244,531.40		
2. Crushing and screening	8,062.58		
3. Depreciation pertaining to 1 and 2	4,686.43		
4. General expenses allocable to items 1 and 2	34,203.20		
Total	291,483.61		
Add costs attributable to opening inventory	4,532.30		
	296,015.91		
Deduct costs attributable to closing inventory	4,601.66		
Cost items 1 to 4 as adjusted by inventory		$291,414.25	
5. Furnacing	34,090.00		
6. Condensing	6,579.23		
7. Cleaning, flasking and transportation	11,212.32		
8. Depreciation allocable to items 5 to 7	8,396.39		
9. General expenses allocable to items 5 to 7	4,777.41		
Total	65,055.35		

Exhibit A—(Continued)

Year Ended June 30, 1940—(Continued)

II. Costs—(Continued)			
Add costs attributable to opening inventory	1,002.99		
	66,058.34		
Deduct costs attributable to closing inventory	1,342.10		
Costs, 5 to 9 as adjusted by inventory		64,716.24	
Total costs, 1 to 9 inclusive			356,130.49
III. Gross sales less items 1 to 9, inclusive			$160,982.65

[34]

Exhibit A—(Continued)

YEAR ENDED JUNE 30, 1941

I. Gross Sales			$791,227.75
II. Costs			
1. Mining and sorting	$390,862.00		
2. Crushing and screening	7,059.87		
3. Depreciation pertaining to 1 and 2	7,371.26		
4. General expenses allocable to items 1 and 2	62,983.28		
Total	468,276.41		
Add costs attributable to opening inventory	4,601.66		
	472,878.07		
Deduct costs attributable to closing inventory	.....		
Cost items 1 to 4 as adjusted by inventory		$472,878.07	
5. Fu*ranc*ing	68,770.66		
6. Condensing	10,216.74		
7. Cleaning, flasking and transportation	10,526.45		
8. Depreciation allocable to items 5 to 7	9,237.06		
9. General expenses allocable to items 5 to 7	16,260.91		
Total	115,011.82		

Exhibit A—(Continued)

Year Ended June 30, 1941—(Continued)

II. Costs—(Continued)			
Add costs attributable to opening inventory	1,342.10		
	116,353.92		
Deduct costs attributable to closing inventory	.....		
Costs, 5 to 9, as adjusted by inventory		116,353.92	
Total costs, 1 to 9, inclusive			589,231.99
III. Gross Sales less items 1 to 9, inclusive			$201,995.76

EXHIBIT B

Exhibit B (Dump ores)

FISCAL YEAR ENDED JUNE 30, 1939

I. Gross Sales			$ 57,844.18
II. Costs			
1. Removing, sorting, crushing and screening	$ 23,420.00		
2. General expenses allocable to item 1	14,119.37		
3. Depreciation allowable	2,593.45		
Total items 1 to 3	40,132.82		
Add costs attributable to opening inventory	1,113.85		
	41,246.67		
Deduct costs attributable to closing inventory	996.24		
Total costs, items 1 to 3 as adjusted by inventory		$ 40,250.43	
4. Furnacing	11,860.86		
5. Condensing	1,120.96		
6. Cleaning, flasking and transportation	994.11		
7. General expenses allocable to items 4 to 6	3,028.28		

Exhibit B—(Continued)

Fiscal Year Ended June 30, 1939—(Continued)

II. Costs—(Continued)			
8. Depreciation allowable to items 4 to 6	1,183.58		
Total items 4 to 8	18,187.79		
Add costs attributable to opening inventory	309.61		
	18,497.40		
Deduct costs attributable to closing inventory	220.59		
Total costs, items 4 to 8 as adjusted by inventory		18,276.81	
Total costs 1 to 8, inclusive			58,527.24
III. Gross sales less items 1 to 8, inclusive (loss)			$ (683.06)

[36]

Exhibit B—(Continued)

FISCAL YEAR ENDED JUNE 30, 1940

I. Gross Sales			$ 80,700.36
II. Costs			
1. Removing, sorting, crushing and sereening	$ 17,337.00		
2. General expenses allocable to item 1	11,633.30		
3. Depreciation allowable	1,593.96		
Total items 1 to 3	30,564.26		
Add costs attributable to opening inventory	996.24		
	31,560.50		
Deduct costs attributable to closing inventory	718.18		
Total costs, items 1 to 3 as adjusted by inventory		$ 30,842.32	
4. Furnacing	11,596.17		
5. Condensing	1,026.82		
6. Cleaning, flasking and transportation	1,749.90		
7. General expenses allocable to items 4 to 6	2,855.81		
8. Depreciation allowable to items 4 to 6	1,624.91		
Total items 4 to 8	18,853.61		

Exhibit B—(Continued)

Fiscal Year Ended June 30, 1940—(Continued)

II. Costs—(Continued)			
Add costs attributable to opening inventory	220.47		
	19,074.08		
Deduct costs attributable to closing inventory	209.46		
Total costs, items 4 to 8 as adjusted by inventory		18,864.62	
Total costs 1 to 8, inclusive			49,706.94
III. Gross sales less items 1 to 8, inclusive			$ 30,993.42

[37]

Exhibit B—(Continued)

FISCAL YEAR ENDED JUNE 30, 1941

I. Gross Sales			$110,489.70
II. Costs			
1. Removing, sorting, crushing and screening	25,710.00		
2. General expenses allocable to item 1	15,549.49		
3. Depreciation allowable	1,819.83		
Total items 1 to 3	43,079.32		
Add costs attributable to opening inventory	718.18		
	43,797.50		
Deduct costs attributable to closing inventory	.....		
Total costs, items 1 to 3 as adjusted by inventory		$ 43,797.50	
4. Furnacing	16,978.29		
5. Condensing	1,426.27		
6. Cleaning, flasking and transportation	1,469.50		
7. General expenses allocable to items 4 to 6	4,014.54		
8. Depreciation allowable to items 4 to 6	2,280.48		
Total items 4 to 8	26,169.08		

Exhibit B—(Continued)

Fiscal Year Ended June 30, 1941—(Continued)

II. Costs—(Continued)			
Add costs attributable to opening inventory.....	209.46		
	26,378.54		
Deduct costs attributable to closing inventory.....	.....		
Total costs, items 4 to 8 as adjusted by inventory....		26,378.64	
Total costs 1 to 8, inclusive.....			70,176.04
III. Gross sales less items 1 to 8, inclusive.....			$ 40,313.66

[38]

EXHIBIT C

Exhibit C (Deficiency computations)

FISCAL YEAR ENDED JUNE 30, 1939

I.	Gross sales (Exhibit A plus Exhibit B)		$323,018.72
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A plus Exhibit B	$248,855.49	
(B)	Total other costs, items 5 to 9, inclusive of Exhibit A plus Exhibit B	55,423.02	
	Total costs of extraction and sale of quicksilver		304,278.51
III.	Operating profit		$ 18,740.21
IV. (A)	Ratio of costs prior to furnacing to total costs	.8179	
(B)	Ratio of other costs to total costs	.1821	
V.	Profits attributable by respondent in deficiency notice to furnacing, condensing, cleaning, flasking and transportation of quicksilver	18,740.21 x .1821	3,412.59
VI. (A)	Gross income from property, item I less items II (B) and V		264,183.11
(B)	Net income from property, item III less item V		15,327.62
VII. (A)	15% of gross income, item VI (A)		39,627.47
(B)	50% of net income, item VI (B)		7,663.81
VIII.	Depletion allowed in deficiency notice		$ 7,663.81

Exhibit C—(Continued)

FISCAL YEAR ENDED JUNE 30, 1940

I.	Gross sales (Exhibit A plus Exhibit B)		597,813.50
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit B plus Exhibit B	$322,256.57	
(B)	Total other costs, items 5 to 9, inclusive of Exhibit A plus Exhibit B	83,584.86	
	Total costs of extraction and sale of quicksilver		405,841.43
III.	Operating profit		$191,972.07
IV. (A)	Ratio of costs prior to furnacing to total costs	.7940	
(B)	Ratio of other costs to total costs	.2060	
V.	Profits attributable by respondent in deficiency notice to furnacing, condensing, cleaning, flasking and transportation of quicksilver	191,972.07 x .2060	39,546.25
VI. (A)	Gross income from property, item I less items II (B) and V		474,682.39
(B)	Net income from property, item III less item V		152,425.82
VII. (A)	15% of gross income, item VI (A)		71,202.36
(B)	50% of net income, item VI (B)		76,212.91
VIII.	Depletion allowed in deficiency notice		$ 71,202.36

Exhibit C—(Continued)

FISCAL YEAR ENDED JUNE 30, 1941

I.	Gross sales (Exhibit A plus Exhibit B)		901,717.45
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A and Exhibit B	$516,675.57	
(B)	Total other costs, items 5 to 9, inclusive of Exhibit A and Exhibit B	142,732.46	
	Total costs of extraction and sale of quicksilver		659,408.03
III.	Operating profit		$242,309.42
IV. (A)	Ratio of costs prior to furnacing to total costs	.7835	
(B)	Ratio of other costs to total costs	.2165	
V.	Profits attributable by respondent in deficiency notice to furnacing, condensing, cleaning, flasking and transportation of quicksilver	$242,309.42 x .2165	$ 52,459.99
VI. (A)	Gross income from property, item I less items II (B) and V		706,525.00
(B)	Net income from property, item III less item V		189,849.43
VII. (A)	15% of gross income, item VI (A)		105,978.75
(B)	50% of net income, item VI (B)		94,924.71
VIII.	Depletion allowed in deficiency notice		$ 94,924.71

EXHIBIT D

FISCAL YEAR ENDED JUNE 30, 1939

(Respondent's amended computations, excluding dump ores)

I.	Gross sales (Exhibit A)		$265,174.54
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A	$208,605.06	
(B)	Total other costs, items 5 to 9, inclusive, of Exhibit A	37,146.21	
	Total costs of extraction and sale of quicksilver		245,751.27
III.	Operating profit		$ 19,423.27
IV. (A)	Ratio of costs prior to furnacing to total costs	.8488	
(B)	Ratio of other costs to total costs	.1512	
V.	Profits alleged by respondent in amended answer to be attributable to furnacing, condensing, cleaning, flasking and transportation of quicksilver (15.12% of $19,423.27)		2,936.80
VI. (A)	Gross income from property (before depletion), item I less items II (B) and V		225,091.53
(B)	Net income from property, item III less item V		16,486.47
VII. (A)	15% of gross income from property, item VI (A)		33,763.73
(B)	50% of net income from property, item VI (B)		8,243.23
VIII.	Depletion alleged by respondent in amended answer to be allowable		$ 8,243.23

Exhibit D—(Continued)

FISCAL YEAR ENDED JUNE 30, 1940

(Respondent's amended computations, excluding dump ores)

I.	Gross sales (Exhibit A)		$517,113.14
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A	$291,414.25	
(B)	Total other costs, items 5 to 7, inclusive, of Exhibit A	64,720.24	
	Total costs of extraction and sale of quicksilver		356,134.49
III.	Operating profit		$160,978.65
IV. (A)	Ratio of costs prior to furnacing to total costs	.8183	
(B)	Ratio of other costs to total costs	.1817	
V.	Profits alleged by respondent in amended answer to be attributable to furnacing, condensing, cleaning, flasking and transportation of quicksilver (18.17% of $160,978.65)		29,250.55
VI. (A)	Gross income from property (before depletion), item I less items II (B) and V		423,142.35
(B)	Net income from property, item III less item V		131,728.10
VII. (A)	15% of gross income from property, item VI (A)		63,471.35
(B)	50% of net income from property, item VI (B)		65,864.05
VIII.	Depletion alleged by respondent in amended answer to be allowable		$ 63,471.35

Exhibit D—(Continued)

FISCAL YEAR ENDED JUNE 30, 1941

(Respondent's amended computations, including dump ores)

I.	Gross sales (Exhibit A)		$791,227.75
II. (A)	Total costs prior to furnacing, items 1 to 4, inclusive, of Exhibit A	$472,878.07	
(B)	Total other costs, items 5 to 9, inclusive, of Exhibit A	116,353.92	
	Total costs of extraction and sale of quicksilver		589,231.99
III.	Operating profit		$201,995.76
IV. (A)	Ratio of costs prior to furnacing to total costs	.8021	
(B)	Ratio of other costs to total costs	.1979	
V.	Profits alleged by respondent in amended answer to be attributable to furnacing, condensing, cleaning, flasking and transportation of quicksilver (19.79% of $201,995.76)		39,974.96
VI. (A)	Gross income from property (before depletion), item I less items II (B) and V		634,898.87
(B)	Net income from property, item III less item V		162,020.80
VII. (A)	15% of gross income from property, item VI (A)		95,234.83
(B)	50% of net income from property, item VI (B)		81,010.40
VIII.	Depletion alleged by respondent in amended answer to be allowable		$ 81,010.40

[Endorsed]: T.C.U.S. Filed Feb. 4, 1943. [44]

The Tax Court of the United States

Docket No. 112,387

KLAU MINE, INC., a corporation,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts shall be taken to be true in the above entitled proceeding, and received as evidence therein: [44-a]

* * * * * * *

(10) In the Petitioner's income and declared-value excess profits tax returns for the calendar year ending December 31, 1940, Petitioner elected to claim percentage depletion and claimed and computed deductions for said depletion in said return [44-b] as follows:

Gross income from property	$171,383.43
15% of gross income	25,707.51
Net income	75,894.23
50% of net income	37,947.11

Petitioner's claimed deduction of $25,707.51 for percentage depletion was based on the assumption that the gross income from the property was measured by the gross proceeds from sale of quicksilver in flasks, as stated in Paragraph 4 hereof.

(11) In arriving at the deficiency involved in this

proceeding, Respondent disallowed depletion as computed by the Petitioner to the extent of $8,595.51. Respondent allowed depletion for said calendar year ending December 31, 1940, in the amount of $17,-112.00. Said amount of depletion was computed by Respondent as shown on Exhibit "B" hereto attached.

* * * * * * *

[Endorsed]: T. C. U. S. Filed Feb. 4, 1943. [44-c]

The Tax Court of the United States

Docket No. 112,388

OAT HILL MINE INC., a dissolved corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts shall be taken to be true in the above entitled proceeding, and received as evidence therein:

* * * * * * *

(10) In the Petitioner's income and declared-value excess profits tax returns for the calendar year ending December 31, 1940, Petitioner elected to claim percentage depletion and claimed and computed de-

ductions for said depletion in said returns as follows:

Gross income from property	$145,997.92
15% of gross income	21,899.68
Net income	36,007.16
50% of net income	18,003.58

Petitioner's claimed deduction of $18,003.58 for percentage depletion was based on the assumption that the gross income from the property was measured by the gross proceeds from sale of quicksilver in flasks, as stated in Paragraph 4 hereof; and included in the deductions from gross income in order to arrive at net income the sum of $3,750 referred to in Paragraph 11 of this stipulation.

(11) In computing its net income for taxation purposes for the calendar year ending December 31, 1940, Petitioner deducted from its gross income the sum of $3,750, representing a payment made to the Pacific Gas and Electric Company, as a payment under a contract for line extension and transformer [44-e] installation for the supply of electric service at Petitioner's Oat Hill Mine. Said payment was made under the terms of a contract in writing between Petitioner and Pacific Gas and Electric Company copy of which is marked Exhibit "B" and attached to this stipulation.

(12) In arriving at the deficiency involved in this proceeding, Respondent disallowed said item paid to the Pacific Gas and Electric Company of $3,750.00, and disallowed depletion as computed by the Petitioner to the extent of $5,550.20. Respondent allowed depletion for said calendar year ending December

31, 1940, in the amount of $12,453.38. Said amount of depletion was computed by Respondent, as shown on Exhibit "C" hereto attached.

If Respondent did not err in disallowing said amount of $3,750, then Respondent concedes that petitioner is entitled to an allowance for percentage depletion of $1,711.57 in addition to the amount allowed in the deficiency notice. Said additional allowance is computed as set forth in Exhibit "D" attached hereto. [44-f]

* * * * * * * *

EXHIBIT "B"

Agreement for Line Extension and/or Transformer Installation to Supply Service to an Installation of Questionable Permanency

Pacific Gas and Electric Company

This Agreement made by and between OAT HILL MINE, INC. hereinafter called Applicant, and PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, hereinafter called Company,

Witnesseth that, in consideration of the mutual promises of the parties hereto herein contained, it is hereby agreed that the Company will furnish all labor appliances and material required for the installation of, and will install for the Applicant, the hereinafter described equipment in order to furnish electric service to Applicant, for use upon property in the County of Napa, State of California, situate at————, for the price and upon the terms and conditions herein set forth, and in accordance with the drawing

hereto annexed which is hereby made a part hereof.

Said equipment shall be as follows:

Approximately 14,310 feet of three phase, 6900 volt, electric line installed on wood poles, together with the necessary appliances; 3-25 KVA & 3-15 KVA transformers, necessary metering equipment.

Said equipment when installed shall at all times remain the property of the Company and the Company shall be entitled to remove the same upon termination of said service.

Whenever part or all of said equipment is to be installed upon property other than that of the Applicant, the Applicant shall first procure from the owners thereof, in the name of Company, all rights of way necessary for the construction, maintenance and operation of said equipment upon such other property, which rights of way shall be satisfactory to the Company and without cost to it.

The Applicant shall pay to the Company immediately upon the execution of this contract as the complete contract price for said work to be performed hereunder, and the Company shall accept, the sum of Three Thousand Seven Hundred Fifty & No/100 Dollars (3750.00—).

If and whenever Applicant shall have operated the electrical apparatus originally installed by him or its equivalent, served from the equipment installed hereunder, for a period of thirty-six (36) consecutive months, and the Applicant's business shall at that time have proved its permanency to the entire satisfaction of the Company, and upon the execution of the proper agreements and the compliance by Ap-

plicant with all the conditions necessary to [44-g] obtain permanent service pursuant to the Company's standard practice relative to the construction of electric line extensions in force at the end of said thirty-six months period, the Company shall repay to Applicant said contract price except such portion thereof as may be required as a line extension deposit under the Company's standard practice relative thereto, and said deposit shall thereafter be refunded in accordance therewith.

In Witness Whereof the parties hereto have executed these presents this——day of————, 1940.

OAT HILL MINE, INC.
H. W. GOULD, Pres.
PACIFIC GAS AND ELECTRIC COMPANY,
By Clifford Bartlett
By B. C. Wise
Manager of its North Bay Division.

REC'D PAYMENT
6739 Dec 9 1940
CALISTOGA
Pd. 3750.00
12-9-40
H.W.G.

[Endorsed]: T. C. U. S. Filed Feb. 4, 1943. [44-h]

United States Board of Tax Appeals

Docket No. 112,389

WILD HORSE QUICKSILVER MINING COMPANY, a dissolved corporation,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts shall be taken to be true in the above entitled proceeding, and received as evidence therein: [44-i]

* * * * * * *

(10) In the Petitioner's income and declared-value excess profits tax returns for the fiscal year ending September 30, 1940, Petitioner elected to claim percentage depletion and claimed and computed deductions for said depletion in said return as follows:

Gross income from property	$116,321.32
15% of gross income	17,448.20
Net income	56,856.22
50% of net income	28,428.11

Petitioner's claimed deduction of $17,448.20 for percentage depletion was based on the assumption that the gross income from the property was measured by the gross proceeds from sale of quicksilver in flasks, as stated in Paragraph 4 hereof.

(11) In arriving at the deficiency involved in this proceeding, Respondent disallowed depletion as computed by the Petitioner to the extent of $7,076.99. Respondent allowed depletion for said fiscal year ending September 30, 1940, in the amount of $10,-371.21. Said amount of depletion was [44-j] computed by Respondent as shown on Exhibit "B" hereto attached.

* * * * * * *

[Endorsed]. T. C. U. S. Filed Feb. 4, 1943 [44-k]

EXCERPTS FROM TRANSCRIPT OF TESTIMONY (SAN FRANCISCO, CALIF. 2-4-1943) RE ORAL MOTION FOR CONSOLIDATION.

Mr. Searls: As these cases all involve one point in common, it is my suggestion, and I tender a stipulation, that the record made in the New Idria case, with respect to the testimony, may be considered as a part of the record in each of the other three cases, and that separate stipulations as to facts will be filed in each case to be a part of the record of the case in which the stipulation pertains.

Is that satisfactory?

Mr. Horrow: That is agreeable, your Honor.

I might suggest that the cases be consolidated for briefing because I think the principal issue of law is involved in each case. [44-l]

In the United States Circuit Court of Appeals for the Ninth Circuit

BTA-Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner on Review.

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

STATEMENT OF EVIDENCE

Following is a statement of evidence in narrative form in the above-entitled cause.

This case was called for hearing before the Honorable Charles P. Smith, Judge of The Tax Court of the United States on the 4th day of February, 1943, together with the cases of Klau Mine, Inc., BTA-Docket No. 112387; Oat Hill Mine, Inc., BTA-Docket No. 112388, and Wild Horse Quicksilver Mining Company, BTA-Docket No. 112389. Robert M. Searls, Esq., appeared as counsel for the petitioner, and Harry R. Horrow, Esq., Special Attorney, Bureau of Internal Revenue, appeared as counsel for respondent. Thereupon, the following proceedings took place:

Thereupon it was agreed by counsel that, since the above-mentioned cases involved on common issue, the record made in the New Idria Quicksilver Mining Company case, with respect to the testimony of wit-

nesses, may be considered as a part of the record in each of the other three cases, and that separate stipulations as to facts be filed in each case to be a part of the record of the case in which the stipulation pertained.

Thereupon, there was introduced and made a part of the record the stipulations of facts in the respective causes, copies of which are made a part of the respective records on review in the several cases.

[45]

Thereupon, counsel for petitioner, after making an opening statement as to the issues and anticipated proof, called the following witnesses who testified in the case:

WALTER W. BRADLEY,

being called and duly sworn, testified on Direct Examination as follows:

I am a mining engineer, and hold the official title of State Mineralogist of the State of California. I am a graduate of the University of California, College of Mining, and have practiced my profession for 42 years. As a part of the duties of my office, I maintain an information bureau of all of the mineral resources of the State of California of whatever kind and character, the location, type, production, extent of development, and various other pertinent facts, including a geological survey. I have had occasion in connection with my work to visit and examine mines throughout the State. I am familiar with the quicksilver mines of this State and have visited at

(Testimony of Walter W. Bradley.)

least 90 per cent of them. I am familiar with the metallurgy of quicksilver ores and form in which the product of quicksilver mines is marketed. The first marketable product from a quicksilver mine is quicksilver metal, or the element mercury. In my experience and particularly within the last ten years, I do not know of any successful concentration of quicksilver ores in this State. It has been tried in a number of places but given up as uneconomical; it would not pay; it is not commercial; the ores are low grade. Quicksilver ore as it comes from the mine itself is not marketable. There is nobody to handle it and nobody would take it. There are no custom mills for quicksilver. The percentage of metal in the ore has gradually dropped until today I think there are some mines working ores that do not carry [46] more than four or five pounds of quicksilver to the ton. In the period of 1915 to 1918 when I conducted a series of experiments and research work on ore dressing of quicksilver ores, the average at that time was, with the larger producers, probably around eight or probably as much as ten pounds of quicksilver per ton. At the time that I conducted a part of the experimental work for the State Mining Bureau I did some work on concentration. I found that physically and technically it was possible to concentrate cinnabar, but it was a question in the ultimate analysis of cost. Compared then with the furnace which had been used for many years as the, what shall I say, the most important producer of quicksilver, the Scott Furnace,

(Testimony of Walter W. Bradley.)

the costs by concentration would have been more than treatment in the Scott Furnace. Just at about the close of my experimental work the rotary furnace was adapted to the roasting of quicksilver ore at the New Idria Mine which, in turn, reduced costs very much below those of the Scott Furnace, and for that reason concentration has never been commercial because it was much cheaper to put the ore through the furnace; so that the first and only marketable product of the operation of the quicksilver mine is the metal itself.

Today you can find in some small veins, where maybe one or two men are working on a small scale and they can hand pick their stuff, they may get ore that will run 20 or 30 per cent of mercury; but those are few and far between. The commercial production of quicksilver today, both in California and other Western States, is on the lower grade ores handled through furnacing larger tonnages. The larger commercial operations have a range below ten pounds of [47] mercury per ton. This means that if you were to attempt to sell the ore you would have to transport 1990 pounds of waste rock in order to transport 10 pounds of mercury. That is not economically possible. There are no custom mills or central mills where such ores could be treated with which I am familiar; and in my position, if there were any such, I would be likely to know.

Cross Examination

It is physically and technically, though not commercially possible, to concentrate quicksilver ores

(Testimony of Walter W. Bradley.)

by standard methods of concentrating other metallic products. In other words, you can use the gravity method, like table zone concentrators; you can use a flotation method; and it can be done by a certain chemical solution method. Nobody uses them because it is not commercial to do so. If you were to concentrate cinnabar by gravity, you would first have to, as in the case of copper ore, grind it up fine, put it over tables which would seperate the higher specific gravity elements from the lower specific gravity elements. The result would be a concentrate of the mineral cinnabar. When you get the cinnabar, you still haven't your quicksilver. That process is comparable from the physical standpoint to the concentration by gravity of gold or silver ores. Physically and technically, the process is the same. In concentrating cinnabar by flotation, you must fine grind it, mix the crushed ore with certain chemical elements or oils and agitate it. The cinnabar rises with the froth and then is collected. This froth contains the mercury. The waste materials drop to the bottom and are discarded. The process technically and physically is the same as concentration by flotation of gold and silver ores. The process [48] depends upon the difference in specific gravity and physical properties between the metallic minerals and the non-metallic gangue. So that cinnabar may be concentrated technically in the same manner as copper, gold or silver. The product obtained through concentration does not change the chemical composition of cinnabar. The concentrated

(Testimony of Walter W. Bradley.)

product is in the same natural state in which it existed when the ores were in place in the mine. This is also true of gold, silver or copper concentrates. The chemical composition and the state of the metal in the concentrated product is the same as it was when it was in the ore-bearing rock in place in the mine. When cinnabar is furnaced, that is put through the furnacing process, its chemical composition changes. It is a process of distillation. The chemical composition is changed by the separation of the mercury from the sulphur in the compound. The product obtained by furnacing and condensing is practically pure mercury or quicksilver, that is, after it is cleaned. I would not be able to say offhand what the exact percentage of purity is prior to cleaning because I don't think anyone analyzes it at that stage. To my knowledge, it is practically pure mercury. The further separation of any impurities that may be with it is purely a chemical process. The process of condensation is purely mechanical process by flotion or gravity. In some instances, it may involve the application of heat, but not usually. Customarily, concentration does not involve the application of heat, speaking of the cases of copper, gold or silver; no heat is applied in the process of gravity or flotation concentration. The process of obtaining mercury through furnacing and condensing is in part a mechanical process. That is, the ore is roasted, the [49] rock is raised to a certain temperature and the rock is itself changed. It is in part oxidized, but the rock is not smelted. It comes through in practically

(Testimony of Walter W. Bradley.)

the same form it was in to begin with; merely the element mercury is distilled over from the furnace to the condensers. It takes mechanical appliances to conduct the furnace operation. Mechanics are involved. You cannot do it without it. You cannot apply heat to a pile of ore on the ground and get quicksilver out of it; you have to put it through certain mechanical appliances. These mechanical processes consist solely of bringing the ore to and carrying it through the heating device, whether you use the old style Scott or the present rotary furnace. The separation of the mercury from the cinnabar is brought about through the application of heat.

The attempted concentration of mercury ore to which I referred involved both mechanical concentration and flotation. It was tried at the New Idria Mine and the Cat Hill Mine, and more recently, three or four years ago, at the Cloverdale Mine in Sonoma County, and in every case it was discontinued because it was not commercial; it was uneconomic. When I say it is uneconomic, I mean that the furnacing process costs so little that there is no justification for this intermediate process. In other words, if it cost you, for example, $100 to produce a flask of quicksilver by the furnace method, and it cost you $150 to produce it by this other method, using concentration, why are you going to spend $150 to produce your quicksilver when you can do it otherwise for $100? By that I mean no prudent business man, or a man in his right senses, would use the concentration method as compared

(Testimony of Walter W. Bradley.)

with furnacing. Over a period of time efforts have been made, other than [50] furnacing, to develop methods of concentrating cinnabar which will be commercially acceptable. I do not know of any attempts being made at the present time to commercially concentrate quicksilver ore. They have been definitely and permanently abandoned. The later efforts that I spoke of were made by people who were ignorant of what had gone on before and simply wasted their money trying something that somebody else had already proven impractical. There is no telling who may take a chance again. I might say, if you don't mind me interposing something by way of background, that when I undertook that experimental work for the State Mining Bureau in 1915 I, myself, had had some years' experience in gold mining. I had visited in the course of my duties for the State Mining Bureau, a number of quicksilver mines, and the thought came to me, in the light of my gold mining experience, why hasn't somebody tried concentration on quicksilver ores. Here is a case of heating 1990 pounds of rock to get out 10 pounds of quicksilver. After three years of experimental work, I concluded that the old timers knew what they were up to and they were working on an economic system; the most economic system. Doubts are very much against the concentration method being adopted in the light of experience. It would be uneconomic to transport crude cinnabar for purposes of extracting the quicksilver through furnacing if you have any regard for com-

(Testimony of Walter W. Bradley.)

mercial profit, and that is what most of us are working for. In other words, it is not economical to separate the function of mining cinnabar from the function of extracting the quicksilver from the ore by furnacing and condensing. Physically, the individual who mines the cinnabar could, of course, turn the crude product over to someone else who might have a furnace right on the premises, or [51] adjacent to the premises, but these things are not done simply because of economic circumstances. I do not know of any case where a lessee is permitted to mine cinnabar where the lessor would extract quicksilver from the mined cinnabar. You would simply be adding elements to your cost. You would be bound to have more overhead costs. A Scott furnace is a vertical type furnace built of brick with interior shelves, and the ore went down and cascaded down below. That type of furnace which was used for quicksilver reduction from 1875 to 1917 is not in use any more. It has been superseded by the rotary furnace. Quicksilver has also been separated from its ores by retorts. These are devices of small capacity and are only suitable for handling selected high grade ores because of the high labor costs and low tonnage capacity involved. There are two types of retorts, one known as the "D" retort with cross sections shaped like the letter "D", and the other known as pipe retorts, which may be pipes similar to a cast iron water pipe, we will say, of varying diameters, depending on what capacity you want to have. They may be 6, 8, 10 or 12 inches in diameter.

(Testimony of Walter W. Bradley.)

They are not very expensive,—might cost from $2,000.00 to $5,000.00, depending on the size. The average size of pipe is probably 10 to 12 inches. They are arranged in banks of 2, 3, up to as high as 12 pipes. A few retorts are being used in California today for small operations. They are not portable in the sense that you take them down and re-erect them somewhere else. The pipes are generally set in place in masonry and as one pipe burns out you put another in its place. [52]

Redirect Examination

In the days when we tried to concentrate quicksilver, even after getting the concentrate, it had to be retorted,—it was not a marketable product. Even at that time there were no commercial mills that handled concentrates. You would not have a marketable product when you got your concentrate. I am familiar with the handling of gold ores in stamp mills where the ore is crushed, run out onto plates and caught by quicksilver and then scraped up in the form of amalgam. The amalgam is heated in retorts and the quicksilver is distilled off from the gold, leaving the gold behind. In the case of a quicksilver furnace you distill the quicksilver off and leave the rock behind. There is no difference in principle; it is a mechanical process; no chemicals are injected into the quicksilver furnace. There is no smelting of ore as there is in a smelter, or injection of other elements to produce alloys, or anything of that sort.

(Testimony of Walter W. Bradley.)

Recross Examination

In amalgamating gold, quicksilver has an affinity for gold and silver, and it is a case of whether the quicksilver is absorbed by the gold or the gold is absorbed by the quicksilver. The two reach a state of intimate mixture which is known as amalgamation. There is a natural occurring mineral which is known as electrum; that is a combination of gold and mercury. You get in amalgam artificially a similar material. Prior to the amalgamation the gold exists in its native form, in the same form in which it existed prior to the removal of the ore from the mine, and prior to crushing. It is united in the process of amalgamation with mercury in its native state. Generally [53] speaking, nothing is done to cinnabar prior to the vaporizing of mercury in the way of adding lime or other substances, but sometimes where you have a high content of certain other sulphides, lime is added to take up the extra sulphur. That is to prevent the excess sulphur driven off from those sulphides from recombining with the mercury and preventing it coming out in a metallic form. In the case of cinnabar, the crushed ore is put through the furnace. In the case of amalgamated gold, the mercury which is vaporized has previously been added artificially.

WORTHEN BRADLEY,

beng called and duly sworn testified on Direct Examination as follows:

I reside in San Francisco and I am President of the Bradley Mining Company. My professional status is that of mining engineer although I did not graduate from college as a mining engineer but became one by experience rather than by a college degree. I was practically raised in the mines, being in contact with them, visiting them and working in mines since my school days and during school vacations. I have had experience in quicksilver mines. The Bradley Mining Company, of which I am president, owns seven quicksilver properties, four in California and three outside of the State. The California mines are the Sulphur Bank, The Reed, Great Western and Mt. Diablo; and there is the Gold Bank Mine in Nevada, and the Bretz and Opalite Mines in Oregon. I have been in charge of operations since 1927. I am familiar with the details of quicksilver mining methods and methods of obtaining metal from the ores. In my opinion, the first marketable product which can be obtained from a quicksilver mine is the metal quicksilver in an iron bottle. It is liquid in its native state and has to be put into a [54] container. There is no intermediate product between the ore in place in the ground and the metallic quicksilver in the flask which can be sold in the market of which I have any knowledge. I do not know of any successful concentration of quick-

(Testimony of Worthen Bradley.)

silver ores as an economic proposition by gravity or flotation.

"Q. Do you consider then that the vaporizing itself is a method of concentration?

Mr. Horrow: I object to that, your Honor. I think it is objectionable.

Mr. Searls: I think the witness is qualified to answer.

Judge Smith: The objection is overruled.

What is the ground for your objection, Mr. Horrow?

Mr. Horrow: Simply this: I think that the statute, or rather, the regulations referred to concentration by gravity or flotation. I think the witness can describe the facts relating to vaporizing of mercury, and just what physical changes take place, what product results, but to characterize that process as concentration, such as concentration by flotation or otherwise, I don't think it is a matter for testimony. It is a pure question of law whether that is concentration within the meaning of the regulation.

Judge Smith: The objection is overruled."

Yes I consider that vaporizing itself is a method of concentrating. You get a concentrated product from the rock, the vapor and the soot,—the soot itself has to be concentrated to remove the last impurities and get the final product, which is the metal, quicksilver. No chemical element is injected into this vaporizing; just heat, and the furnace rotates and the [55] ore gradually rolls from the

(Testimony of Worthen Bradley.)

upper end down to the lower. You have the two elements of motion and heat, the motion is purely mechanical. In so far as I know, the concentrates of quicksilver metal have never been marketed as concentrates. The only instance I know of is that there is some antimony concentrates coming in from Mexico which have mercury in them as a by-product. There is no domestic United States ore that is marketable in the form of concentrates that I know of. Even where it is physically possible to concentrate it, the concentrates had to be roasted before a marketable product was obtained.

Cross Examination

The reference to vaporizing as a form of "concentration,"—I used the word in the sense of obtaining a small product from a big one. I would characterize the refining of gold as a concentration in the same sense. In other words, I would characterize as concentration any process whereby the weight of the product derived from the treating of metallic ores was lessened. The furnacing of cinnabar involves heat and motion. Cinnabar cannot be furnaced without movement of the cinnabar, if furnaced means a large mechanical affair and not just a small oven-like affair which would characterize it a retort. It may not be roasted on a large scale so as to obtain mercury without keeping the cinnabar in motion. On a small scale it could be roasted without being in motion. It may be roasted in a retort and mercury obtained therefrom without moving the ore on a small scale. The motion I

(Testimony of Worthen Bradley.)

refer to is not simply that of bringing the ores through the furnace and out of the furnace. It is different in this respect: You are moving a large mass of material; you are retorting a large mass of material, [56] which has to be turned over and over to liberate the gases which are present. You have the product of combustion and gases from the ore all present in the same chamber, and they have to be drawn off. In the case of a retort, you have only the gases from the ore drawn off. That is getting technical, but there is a fine point there. You have a much larger gas volume drawn off from a moving mass in a rotating furnace than you do from a small mass in a retort. The motion of the ore certainly has something to do with releasing the mercury from the cinnabar; it does not take place only through the application of heat. You can put some very high-grade ore in a retort which is motionless. If the cinnabar—the richest part—is in the center of the rock and barren rock is on the outside. Sometimes it will not be burned through because there is no motion. In a furnace which turns it over and over, and you also have the chance of breaking it up in the furnace, you can get all faces of the rock exposed to the heat. The motion is a matter of exposing the cinnabar to the heat, but it is an aider and abetter of the breaking up of the chemical components. It is an aid in bringing about the application of the heat and the breakdown in the chemical composition results in the application of the heat.

(Testimony of Worthen Bradley.)

Redirect Examination

When you concentrate any ore by flotation, the agitation which takes place ahead of flotation cells makes it possible for the water to wash away the waste and leave the concentrates. That is usually done to create a uniform mixture for the flotation cells, rather than to wash anything away. You may get a lot of residue that you do not treat further. [57]

Recross Examination

No chemical change takes place in concentration by gravity or flotation of gold or silver ores.

HENRY W. GOULD,

being called as a witness on behalf of the petitioner, having been first duly sworn, testified on Direct Examination as follows:

I am vice president and general manager of the New Idria Quicksilver Mining Company, petitioner herein; also president of the Oat Hill Mining Company, the Wild Horse Quicksilver Mining Company, and was at one time president of the Klau Mines, Inc. I am a mining engineer and operator—not a college graduate. I did not attend the university. I obtained my experience by starting in the mines about 1902; it has been largely with quicksilver mines. We developed the rotary furnace referred to here and hold some patents on it. One of these furnaces is known as the Gould furnace. I am

(Testimony of Henry W. Gould.)

familiar with most of the quicksilver mines in this country. I obtained my familiarity by visiting these mines over a period of many years, both with the idea of examining the mines and also with the idea of selling furnaces. I am familiar with the process of obtaining quicksilver from the ore in practically all of these mines. 98% of the quicksilver ore of the United States is cinnabar, which is a sulphide of mercury. The grade of the ore varies greatly even in the same mine. For instance, at New Idria, it ranges from 2 pounds up to 40 pounds or more per ton. The average in this country, I think, is around 5 or 6 pounds. I may be mistaken on that, but not far from that point. At New Idria, for the past year, our recovery was 4.83 per ton. I guess it is the largest producer in the [58] country and it has been for many years. Last year, we produced about 8,000 flasks; 7,984 to be exact. The first marketable product we get from the mine is what we can sell in the flasks, as such. We sell them either in San Francisco or New York. That is the custom so far. All of our quicksilver has been sold either in San Francisco or New York for the past five years. Cinnabar ore has never been marketed in the United States in its crude state. I do not know of any quicksilver product that is sold in this country except the quicksilver itself as mined and furnaced on the job at the plant. I don't know as to the possibility of concentrating quicksilver economically, but I think I have done more work along that line than anyone in the country. We tried for

(Testimony of Henry W. Gould.)

dumps as distinguished from the burned ore dumps.

Mr. Horrow: With that understanding I have no objection.

Q. (By Mr. Searls) I ask you now whether the ore which you took out of these mine dumps is the same character rock that you find underground in your mind? A. Exactly the same; yes.

Q. Cinnabar? A. Yes.

Q. And it simply has not been treated other than to be taken out of the ground? A. No.

Q. Now, with respect to the burned ore dumps, what is the character of the ore of those dumps that you take?

A. Those dumps were old furnace dumps put there prior to 1902. I was not there in 1902, but I was there in 1908. I know that in 1901 the furnaces were not built, but they were built in 1902. The old furnace [61] dumps prior to 1900 were covered up by the Scott furnaces that were built in 1901 and 1902. These dumps were mine ore dumps with adobe in them, and this was a coarse ore furnace. We could tell those old dumps by the amount of adobe that was in them and the fact that it was all coarse ore. We had to take the top off of that, of that coarse ore furnace dump, about 20 feet of overburden which the Scott dumps placed there after that time. But the ore was the same as any ore except that it carried more quicksilver per ton. With the Scott ore furnace it wouldn't pay to run it and we had to waste that.

(Testimony of Henry W. Gould.)

Q. Why was this ore wasted—how did it come to be left there?

A. Because they had very poor furnaces in those days. The furnaces of that time were rather a crude affair as compared to the Scott furnaces, which was a big improvement, and later the rotary furnace, which completely eliminated the possibility of getting anything in the tailings in the future.

Q. In other words, at the time those dump ores were placed there the furnace simply removed part of the quicksilver and left the rest in the ore?

A. Exactly.

Q. And you have found it possible, with your improved furnace, to remove the balance of that quicksilver?

A. That and the improved price of quicksilver helped too.

Q. Now, with respect to the Oat Hill case—this testimony applies only to that case—Mr. Gould, do you remember the time you started the Oat Hill operation and making arrangements with the Pacific Gas and Electric [62] Company for the supplying of electric power to that mine?

A. Yes.

Q. And making a deposit for that purpose?

A. Yes, sir.

Q. At the time you did that, what was your opinion as to the length of the operation which you might reasonably expect for mining the Oat Hill ore?

Mr. Horrow: Will you read the question, please?

Mr. Searls: Well, just strike it out.

(Testimony of Henry W. Gould.)

By Mr. Searls:

Q. Looking at the situation as it appeared at the time you made this deposit with the Pacific Gas and Electric Company, what would you say was the then apparent life of the operation?

A. As long as the war, which might have been three years, possibly less at that time.

Cross Examination

Cinnabar has a characteristic vermillion color, sort of a reddish color. The ore containing cinnabar can be differentiated from waste ore which does not contain cinnabar, if it is rich enough. After the furnacing operation, the quantity of mercury and soot collected in the buckets is very much less than the quantity of ore run through the furnace. It may be 1%, or something like that. Last year, we received about 4.83 pounds of clean mercury per ton and about 50 pounds of soot and other residue were collected with the mercury in the buckets; we got approximately [63] 19 or 20 pounds collected in the buckets after furnacing and condensing out each ton of crude ore placed in the furnace.

"Q. You were comparing the furnacing operation with the stamp mill operation. Can you state the quantity of concentrated ore that is obtained in comparison with the amount of crude ore material that is run through the mill?

A. It would depend—if you are stamp milling —I ran a stamp mill for several years. We handled 400 tons a day; of that, we got about 30 tons of concentrates, besides the amalgam we took out. The

(Testimony of Henry W. Gould.)

amalgam was not much, but we got about 30 tons of concentrates per day."

Of the ore that goes through the stamp mill, we saved about one-half of our gold by the stamp mill; the balance by concentration. The stuff that went through the stamp mill was a very small proportion. Most of it was received in the concentrates. The degree of refinement of gold in the concentrated ore depends upon the mine. It is in its natural state but not all straight gold. The mercury obtained from furnacing is all pure mercury. Mercury is not found in a pure state in cinnabar. Sometimes pure mercury can be found in its natural state, but that is not true with respect to any of the mines involved in these cases. Here, all of the mercury is obtained from cinnabar. I know of many instances where crude ores containing cinnabar in place in its natural state are removed by power shovels. This is being done at New Idria, at the Sulphur Bank in Lake County and at several mines. Cinnabar in place is not necessarily, generally or customarily removed by power shovel, but it may be if close [64] enough to the surface. Customarily the ore is removed by underground operations but they may be taking a lot of stuff from the surface. I couldn't tell you what percentage of crude ore mined at New Idria was removed by shovel. Last year we removed a lot of ore from the surface; more from the surface than we did from underground. I am referring to ore that was in place. Some of it was in place and some was

(Testimony of Henry W. Gould.)

not. It is mighty hard to differentiate what is in place and what isn't. I mean, we have a mountain and a talus coming down from this mountain. The surface of that does not carry values, but as soon as you get underground, before you get to the solid rock, you find an old talus that has been coming down that mountain side for a long time. We mine that the same as we do ore underground,— I mean ore in the mountain. At New Idria that ore stood up there some 250 feet above the bottom of the mine at the time we started mining it. We were mining on that surface ever since until the last few years. We are mining it now. When we removed the cinnabar by power shovel it was underneath the surface. We removed the cinnabar by power shovel. When we came to the hardwall we went on in if there was anything to go for. Some of the cinnabar was taken out of the rock by power shovel.

We did not concentrate dump ores at New Idria during the period in litigation. Before we got the furnaces all in operation we concentrated a little. We had a small operation there with a jig. We made a very poor reovery, about 60%, which we immediately stopped as soon as we got the additional furnaces in operation. We did not use concentration on dump ores because we did not have enough yield from them. When we got our furnaces in then we went back to furnacing. [65]

"Q. So that if the price of quicksilver becomes high enough, and if your crude ores are sufficiently low in grade, concentration is advisable?

(Testimony of Henry W. Gould.)

A. No, I don't think so. It is something we can boost production on at the moment and take advantage of the high price. We don't know how long it would last. There was no great amount of it run and it was not very successful."

Upon completion of the foregoing testimony, the cause was argued and submitted upon briefs, and thereafter briefs were duly filed by petitioner and respondent with the Court.

The foregoing evidence, including the respective stipulations of facts, is all of the material evidence adduced at the hearing before the Tax Court, and this statement is hereby approved by the undersigned counsel for the parties as a correct statement of the evidence in narrative form.

ROBERT M. SEARLS
Attorney for Petitioner on Review.

(Signed) J. P. WENCHEL
SLY
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent on Review.

CRM/cal
9/25/43

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943. [66]

2 T. C. No. 50

The Tax Court of the United States

Dockets Nos. 112386-112389, incl.

NEW IDRIA QUICKSILVER MINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

KLAU MINE, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OAT HILL MINE, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

WILD HORSE QUICKSILVER MINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

Promulgated July 14, 1943

1. The basis for computing percentage depletion on quicksilver mines for 1939, 1940, and 1941 held to be the market value of the cinnabar ore, from which the quicksilver was extracted, at the mouth of the mines and not the market value of the quicksilver in flasks, as reflected in gross sales thereof.

2. Percentage depletion deductions held not allowable on income derived from processing "dump" ores which were deposited on taxpayer's premises by prior owners and operators of the mine. Carl M. Britt, 43 B.T.A. 254, and Consolidated Chollar Gould & Savage Mining Co., 46 B.T.A. 241, followed; Kennedy Mining and Milling Co., 43 B.T.A. 617, distinguished.

3. Amount paid to a utility company to cover the cost of extending a power line to taxpayer's mine under a contract which provided for return of the amounts to the taxpayer at the end of a three year period, upon certain stipulated conditions, held not

deductible in whole or in the year of payment as a business expense and not subject to an allowance for exhaustion or depreciation, in the absence of a proper basis for computing such an allowance.

Robert M. Searls, Esq.,
for the petitioners.

Harry R. Horrow, Esq.,
for the respondent.

[Seal]

[67]

These proceedings, consolidated for hearing, involve deficiencies in income taxes and declared value excess profits taxes as follows:

New Idria Quicksilver Mining Co., Inc., Docket No. 112386.

Year Ended	Income Tax
June 30, 1939	$ 188.34
June 30, 1940	3,414.32
June 30, 1941	6,540.50

Klau Mine, Inc., Docket No. 112387

Year	Income Tax	Declared Value Excess Profits Tax
1940	$3,934.70	$218.53

Oat Hill Mine, Inc., Docket No. 112388

Year	Income Tax
1940	$2,680.63

Wild Horse Quicksilver Mining Co., Docket No. 112389

Year Ended	Income Tax
Sept. 30, 1940	$1,344.63

The issues presented are (1) whether in the case of quicksilver mines percentage depletion is to be

computed on the gross sales of the marketable product, that is, mercury in iron flasks, or on the market value of the cinnabar ore from which it is extracted as it emerges from the mines; (2) whether any depletion deductions are allowable in respect of the mercury produced from "dump" ores deposited on the premises by prior owners; and (3) whether an amount paid by one of the petitioners to an electric company for the extension of a power line to its mine is deductible in the year of payment.

Issue (1) is common to all of the proceedings, while issue (2) is involved only in the case of New Idria Quicksilver Mining Co., Docket No. 112386, and issue (3) only in the case of Oat Hill Mine, Inc., Docket No. 112388. [68]

FINDINGS OF FACT

The New Idria Quicksilver Mining Co. is a Nevada corporation with its principal office at No. 10 Pent House, Mills Building, San Francisco, California.

Klau Mine, Inc., is a California corporation with its principal place of business at 100 Mills Building, San Francisco.

Oat Hill Mine, Inc., was a California corporation with its principal office at 100 Mills Biulding, San Francisco. It was dissolved in December 1941 and its directors became trustees for the creditors and stockholders.

Wild Horse Quicksilver Mining Co. was a Nevada corporation with its principal place of business at

200 Montgomery Street, San Francisco, California. It was dissolved in December, 1941, and its directors became trustees for the creditors and stockholders.

All of the petitioners filed their income and declared value excess profits tax returns with the collector of internal revenue for the first district of California. Their returns were all made on an accrual basis.

During all of the taxable years New Idria Quicksilver Mining Co., referred to hereinafter in our findings of fact as petitioner, owned and operated a quicksilver mine located in San Benito County, California, which it purchased in 1936.

Quicksilver, or mercury, is obtained from ore containing cinnabar, a chemical compound of mercuric sulphide. The cinnabar ore is crushed and roasted in ovens and the mercury is released in the form of a vapor. The vaporized mercury is then condensed and worked with lime to remove soot and other impurities. After this cleaning operation the mercury is placed in metal containers or "flasks" and sold on the market.

Petitioner's principal source of mercury during the taxable years was crude cinnabar ore extracted from subterranean workings in its mine. These workings were developed by "drifts" and "crosscuts." The ores were blasted [69] and sorted in the mine and those containing sufficient cinnabar were hauled in cars to the surface where they were crushed and carried by conveyors to the furnaces.

Petitioner operates two furnaces at its mine. They

are of the rotary type, five feet in diameter and fifty-six feet in length. They are made of iron and lined with fire brick. The crushed ores are fed into the furnaces and heated to a temperature of about 1200° Fahr. The mercury vapors as they are released by the heat are drawn from the furnace by suction fans and passed into a condenser system, which consists of two vertical banks of ten pieces of sixteen inch iron pipe each, with rubber buckets at the bottom of the pipes to collect the condensed mercury. These buckets are emptied on tables where the contents are mixed with slack lime and worked with hoes to cleanse or free the mercury. After this operation the mercury is practically pure and is ready for market.

This method of extracting mercury is similar in many respects to the method used in extracting gold by the "amalgamation" process. By that process concentrated gold ore is treated with mercury, causing a fusion or amalgamation of the gold and mercury, which are said to have a natural affinity for each other, and the mercury is then separated from the gold by distillation.

Experiments have been made from time to time in prior years, by petitioner and others, with different methods, such as the "gravity" and "flotation" methods, for concentrating the cinnabar ore before furnacing and condensing it. These experiments have all proven uneconomical. The cost of concentration alone was found to be approximately as great as or greater than the cost of roasting the crude ore in the rotary furnaces, and the concen-

trated ore still had to be heated in retorts. At the present time the [70] method employed by the petitioner, as described above, is that generally used in the production of mercury, commercially, in the United States.

There are located on petitioner's properties large deposits of ores which in years past have been mined and discarded by former operators. Some of these ores have been furnaced by former operators and some discarded before furnacing because of their low content of cinnabar ore. Mine operations have been carried on on the property continually since about 1858. The discarded and burnt ores, which are referred to in the stipulation as "dump" ores, contain a small amount of cinnabar from which mercury can be profitably recovered under modern improved methods of operation. The petitioner processed considerable quantities of these dump ores during the taxable years, in addition to the crude ore which it extracted from its mine. They were loaded on trucks with steam shovels and hauled to the furnaces where they were processed in the same manner as the crude ore from the mines. The dump ore deposits are located about a mile and a half from petitioner's plant.

Petitioner's gross sales of mercury obtained from the mined ores and from dump ores during each of the taxable years and its net sales, after deductions of all costs of production but without any deduction for depletion, were as follows:

	Mined Ores		Dump Ores	
Year	Gross Sales	Net Sales	Gross Sales	Net Sales
1939	$265,174.54	$ 19,423.27	$ 57,844.18	$ 683.06 (Loss)
1940	517,113.14	160,982.65	80,700.36	30,993.42
1941	791,227.75	201,995.76	110,489.70	40,313.66

Crude cinnabar ore was not bought or sold in the vicinity of petitioner's mine during any of the taxable years and there has never been any established market for it. [71]

Petitioner elected to claim depletion deductions in its income and declared value excess profits tax returns for the taxable years 1939, 1940, and 1941 on a percentage basis, computed on its total gross sales of mercury from all sources. The respondent determined in his deficiency notice that petitioner's percentage depletion deductions should be computed on the basis of the selling price, or market value, of the cinnabar ore at the mouth of the mine and not on the selling price of the mercury in flasks. He arrived at that basis by excluding from gross sales, on which the depletion deductions were computed, all of the costs of transporting, furnacing, condensing, cleaning, and flasking, as shown by the petitioner's books. The resulting reduction of the depletion allowances claimed in petitioner's returns for each of the taxable years was as follows:

Year Ended	Claimed in returns	Allowed in deficiency notice
June 30, 1939	$ 9,009.03	$ 7,663.81
June 30, 1940	89,672.03	71,202.36
June 30, 1941	122,176.80	94,924.71

The respondent has filed an amended answer in which he alleges that all of the depletion allowances claimed by the petitioner in respect of the "dump" ores should be disallowed and that the deficiencies as determined in the deficiency notice should be increased accordingly. As so increased the deficiencies amount to $226.05 for 1939, $5,133.10 for 1940, and $9,879.94 for 1941.

It is stipulated that the deposits of dump ores on petitioner's properties and all rights in them have been at all times an unsevered part of the realty on which the petitioner's mine is located and that the portions of such deposits processed by petitioner during the taxable years were placed thereon prior to March 1, 1913, and so have never been subjected [72] to any depletion allowances in any returns filed by petitioner or prior owners of the property.

Each of the other three consolidated cases involes the identical question set out under issue (1) above. A stipulation of facts has been submitted in each case and we adopt the written stipulations as part of our findings of fact. The facts in each proceeding, in so far as they pertain to the question in issue, are the same in all material respects as those stated above. All of the petitioners, with the exception of Oat Hill Mine, Inc., owned the mines which they operated. That company operated under a sublease.

In determining the deficiency against Oat Hill Mine, Inc., the respondent disallowed the deduction of an item of $3,750 which that company paid

in 1940 to the Pacific Gas & Electric Co. for the extension of an electric line and the installation of transformers necessary to furnish electric current to its mine. The payment was made under a contract which provided that all of the equipment so used should remain the property of the electric company and that:

> If and whenever Applicant shall have operated the electrical apparatus originally installed by him or its equivalent, served from the equipment installed hereunder, for a period of thirty-six (36) consecutive months, and the Applicant's business shall at that time have proved its permanency to the entire satisfaction of the Company, and upon the execution of the proper agreements and the compliance by Applicant with all the conditions necessary to obtain permanent service pursuant to the Company's standard practice relative to the construction of electric line extensions in force at the end of said thirty-six months period, the Company shall repay to Applicant said contract price except such portion thereof as may be required as a line extension deposit under the Company's standard practice relative thereto, and said deposit shall thereafter be refunded in accordance therewith. [73]

OPINION

Smith, Judge: Our first question is the determination of the correct basis to be used in computing percentage depletion deductions on peti-

tioner's quicksilver mines. Petitioners contend that the correct basis is the market value of the mercury in flasks, as reflected in the gross sales of mercury in each of the taxable years. The respondent contends that it is the market value of the cinnabar ore, from which the mercury was obtained, at the mouth of the mines, arrived at by deducting from gross sales of mercury the cost of processing the ore, including furnacing, condensing, cleaning, flasking and transporting.

Section 23(m) of the Internal Revenue Code provides for a reasonable allowance for depletion, in the case of mines, to be made under rules and regulations to be prescribed by the Commissioner, and section 114(b)(4) allows percentage depletion in the case of metal mines in the amount of 15 percent of the gross income from the property. The Commissioner, in Regulations 103, section 19.23 (m)-1(f) states that gross income from the property means the selling price of the crude mineral product in the immediate vicinity of the mine, but that if the product is processed, or if there is no representative market, the market value of the crude mineral product is constructed by deducting costs from the first marketable product, except that the cost of certain processes are not deductible. The exception applicable to quicksilver is the cost of "crushing, concentrating (by gravity or flotation), and other processes to the extent to which they do not beneficiate the product in greater degree (in relation to the crude mineral product on the one hand and the refined product on the other)

than crushing and concentrating (by gravity or flotation)." [74]

Applying his regulations the respondent has computed petitioner's depletion deductions on gross sales of mercury less that portion of the cost of production, and a representative portion of the profits, attributable to furnacing, condensing, cleaning, flasking, and transporting the mercury.

The undisputed facts are that petitioners did not sell the crude mineral product (that is the cinnabar ore) in the vicinity of the mine, or elsewhere, and that there was no representative market value for such product. It was therefore necessary for the respondent in applying his regulations to construct a market value for the product, as he did. Our question then is, did the furnacing, condensing, cleaning, and flasking "beneficiate" the product to a greater degree than crushing and concentrating by gravity or flotation, so that the cost of those processes must be deducted from the gross sales in determining the market value of the product.

In mining parlance the term "beneficiate" means:

a. To reduce (ores).

b. To concentrate or otherwise prepare for smelting (esp. iron ore), as by drying, sintering, magnetic concentration, etc. (Webster's New International Dictionary, Second Ed.)

In the process of concentrating ores by the gravity method the crushed ore is placed on tables and agitated so that the higher and lower specific gravity elements are mechanically separated. In the

flotation method the crushed ore is mixed with oils in vats and agitated by means of steam or mechanical defices. The metallic particles rise as a froth on the oil and are then collected. The concentrating processes are usually followed by smelting. The evidence before us is that the cinnabar ore was not concentrated, either by the gravity or the flotation method, and that there was no process comparable thereto. The ore was fed into the furnaces as it emerged from the mine. [75]

The evidence is that, preliminary to furnacing, the cinnabar ore was crushed at the mines to a size of not more than two inches. A much finer crushing is required in the process of concentrating ores, especially by the flotation method where the ore is reduced to a powder form. If used in that sense in the regulations, as apparently it is, petitioners neither crushed nor cencentrated the cinnabar ore before furnacing.

According to the testimony of the witnesses in these proceedings it is physically possible to concentrate cinnabar ore either by gravity or flotation, but this was not done by petitioners or by the quicksilver mining industry anywhere in the United States at any time during the taxable years for the reason that it had been proven uneconomical. After concentrating the ore the other processes of furnacing, condensing, cleaning, and flasking were still necessary. From these facts it is reasonable to conclude, we think, that all of these processes, that is, furnacing, condensing, cleaning, and flasking beneficiated the product in a greater degree than

"crushing" and "concentrating" and therefore do not come within the excepted processes referred to in subsection (f)(4) of the regulations.

Perhaps, as petitioners argue, the regulations were not drafted to fit the particular conditions of quicksilver mining. Nevertheless the purpose of the regulations is clear. It is to compute the percentage depletion allowances for all types of mines on the basis of income attributable to the using up or the "depletion" of the mineral or metal products, as distinguished from the income attributable to the various processes utilized in preparing the product for the market. We can not say that in their plan for furtherance of that purpose the regulations are so contrary to the statute or so out of harmony with the meaning and purpose of the statute as to be invalid. See Commissioner v. Winslow, 113 Fed.(2d) 418, and cases there cited. [76]

Literally the statute provides that the depletion allowance shall be computed on a percentage of the "gross income from the property." Gross income is defined in section 22 of the Internal Revenue Code as:

> * * * gains, profits, and income derived from * * * trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from * * * the transaction of any business carried on for gain or profit, * * *

Section 19.22(a)-5 of Regulations 103, promulgated under the quoted provision of the Code, defines gross income as follows:

> Sec. 19.22(a)-5. Gross income from business. —in the case of a manufacturing, merchandising, or mining business, "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. In determining the gross income substractions should not be made for depreciation, depletion, selling expenses, or losses, or for items not ordinarily used in computing the cost of goods sold.

See also Eisner v. Macomber, 252 U. S. 189; Merchants' Loan and Trust Co. v. Smietanka, 255 U. S. 509; Crews v. Commissioner, 89 Fed. (2d) 412.

In the case of oil and gas wells gross income from the property, for the purpose of computing depletion deductions, has been defined as that portion of the total profits from the sale of oil and gas which represents the fair market or field price at the mouth of the wells. Greensboro Gas Co. v. Commissioner, 79 Fed. (2d) 701; affirming 30 B.T.A. 1362; certiorari denied, 296 U.S. 639; Consumers Natural Gas Co. v Commissioner, 78 Fed. (2d) 161. See also Helvering v. Twin Bell Oil Syndicate, 293 U.S. 312; Helvering v. Mountain Producers Corp., 303 U.S. 376 In Anderson v. Helvering, 310 U.S. 404, it was said that: [77]

> Oil and gas reserves like other minerals in place, are recognized as wasting assets The production of oil and gas, like the mining of ore,

> is treated as an income-producing operation, not as a conversion of capital investment as upon a sale, and is said to resemble a manufacturing business carried on by the use of the soil. * * * (Citing cases). The depletion effected by production is likened to the depreciation of machinery or the using up of raw materials in manufacturing. * * * (Citing cases) The deduction is therefore permitted as an act of grace and is intended as compensation for the capital assets consumed in the production of income through the severance of the minerals. * * * The granting of an arbitrary deduction, in the interests of convenience, of a percentage of the gross income derived from the severance of oil and gas, merely emphasizes the underlying theory of the allowance as a tax-free return of the capital consumed in the production of gross income through severance. * * *

In Brea Cannon Oil Co. v. Commissioner, 77 Fed. (2d) 67; certiorari denied, 296 U. S. 604, the court held, affirming 29 B.T.A. 1134, that 60 percent of the gross receipts from the sale of casinghead gas represented the cost of processing, by which the casinghead gas was separated from the wet gas with which it was mixed as it emerged from the well, and did not constitute "gross income of the property" for the purpose of determining percentage depletion deductions. The court said in that case:

> While the act of Congress and regulations adopted in pursuance thereof must be construed according to the plain import, it should be borne

> in mind in determining the amount of the depletion allowance that such allowance is intended to represent the amount of capital recovered in the product produced by the well, that is the value of the raw product. * * *

We think that the result which the respondent has reached here by applying his regulations comports with the purpose of section 114(b)(4) I.R.C. as that section has been construed by the courts. The position taken by the petitioners that their percentage depletion on quicksilver mines should be computed upon the total gross sales of mercury as finally processed is, we think, contrary to the purpose of the statute. [78]

The second issue involves the question of the right of petitioner, New Idria Quicksilver Mining Co., to include in the basis for computing depletion deductions in each of the taxable years the income derived from the sale of mercury extracted from the dump ores which it processed during each of such years.

This question is controlled, we think, by the opinion of the Circuit Court of Appeals for the Tenth Circuit in Atlas Milling Co. v. Jones, 115 Fed. (2d) 61, and the opinions of this Court in Carl M. Britt, 43 B.T.A. 254, and Consolidated Chollar Gould & Savage Mining Co., 46 B.T.A. 241 Depletion deductions on dump ores or "tailings" claimed by the taxpayers in those cases were disallowed on the grounds that such deposits are not "mines" and that they do not represent a depletable interest in the

hands of the owner. Although the facts in the instant case differ somewhat from those in the cited cases we think that the same principle governs. In the Atlas Milling Co. case, supra, and in the Carl M. Britt case, supra, the taxpayers were lessees who had acquired, by contract, the right to process the dump ores which had been deposited on the premises of the lessors. In Consolidated Chollar Gould & Savage Mining Co., supra, the dump ores had been deposited on the taxpayer's land by others prior to its acquisition by the taxpayer. The only difference between the facts in that case and those in the instant case is that here the dump ores originally came from the mine located on the taxpayers's property rather than from the properties of others. In this respect the facts in this case resemble those in Kennedy Mining and Milling Co., 43 B.T.A. 617, where we held, distinguishing the Atlas and the Britt cases, supra, that the taxpayer was entitled to include in its basis for computing percentage depletion deductions the income from processing dump ores which it had [79] taken from its own mine during its ownership and operation of the mine. We said that:

> * * * The economic interest of this petitioner in the tailings and in the minerals to be extracted therefrom was identical with the interest it had maintained through its ownership of the mine from beginning to end of the extractive process; and when it finally received the proceeds of the minerals contained in the tailings it received income from the contents of the mine to exactly the same extent as the income

it had previously received from the earlier and more rudimentary refining process. It follows that respondent's disallowance of petitioner's claim was error and should be reversed.

That is not the situation here. The income which petitioner received from processed dump ores was not income from the operation of its mine. The dump ores had been removed from the mine long before the petitioner acquired the property and were not a part of the mine at any time during petitioner's ownership. The evidence does not show that any value was attributed to the dump ores as separate property in petitioner's acquisition of the mine or that they had any cost to the petitioner. In these circumstances we think that petitioner's claim for a percentage depletion allowance based on the income received from processing the dump ores must be denied.

The remaining question for determination involves the payment of $3,750 which Oat Hill Mine, Inc., made during the taxable year 1940 to Pacific Gas and Electric Co. representing the cost of an extension of a power line to its mine. Petitioner claimed the deduction of the entire amount of the payment in its return for 1940 as an ordinary and necessary business expense. It now contends that it is entitled to the deduction either of the full amount as claimed in its return, or in the alternative, to an aliquot portion thereof spread ratably over the anticipated use of the facilities. The respondent contends that no part of the expenditure is deductible in the taxable year 1940. We think that the respondent's posi-

tion is sound. Where the benefits [80] obtained from an expenditure extend over a period of one year or less the amount is usually deducted in full in the year of payment, other conditions of the statute authorizing the deduction being met. If they extend for a longer period the cost of the facilities may require spreading over the period of their expected use.

The facts here are that the petitioner made the payment in question under a contract which provided that the whole amount, except for the normal consumer's deposit, would be returned to it at the end of a three-year period, provided certain conditions should be met. There was no way of knowing at the time of the payment, or at any time during the taxable year, whether those conditions would be met and whether the amount would ever be refunded.

In any event it seems to us that the expenditure was in the nature of a capital investment, since the benefit to be derived from it was to extend over the entire period of petitioner's operations. In Duffy v. Central Raailroad Co. of New Jersey, 268 U. S. 55, the Supreme Court said of expenditures made by the lessee of railroad properties for additions and betterments under a long-term lease that:

> Clearly the expenditures were not "expenses paid within the year in the maintenance and operation of its (respondent's) business and properties;" but were for additions and bet-

terments of a permanent character, such as would, if made by an owner, come within the proviso in subdivision Second, "that no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments made to increase the value of any property, etc." They were made, not to keep the properties going, but to create additions to them. They constituted, not upkeep, but investment; —not maintenance or operating expenses, deductible under subdivision First, section 12(a), but capital, subject to annual allowances for exhaustion or depreciation under subdivision Second.

Under petitioner's contract with the electric company the equipment became the property of the latter. What petitioner actually acquired was a [81] contractual right to have electric current furnished at tis mine for an indefinite period. While the contract does not so provide we assume that petitioner was to pay the normal rate charged to other consumers and that it was entitled to the services as long as it should operate the mine, without any further outlay of capital. Even if petitioner should be regarded as having a capital investment in the facilities or in the contract itself we have no means of determining the period of their expected use by the petitioner on which to base any allowance for depreciation or exhaustion. Petitioner argues in its brief that the evidence shows an expected use of not more than three years and refers us to the following testimony of one of its witnesses:

Q. Looking at the situation as it appeared at the time you made this deposit with the Pacific Gas and Electric Company, what would you say was the then apparent life of the operation?

A. As long as the war, which might have been three years, possibly less at that time.

This evidence is much too indefinite and speculative to support an allowance for depreciation or exhaustion of capital assets. The probable duration of the war in 1940, even as today, was a matter on which the best informed persons widely disagreed. It is not explained either why petitioner's operations were expected to continue only for the duration of the war. We do not have petitioner's lease before us and do not know the length of its term. So far as the evidence shows, the mine is still being operated, although it is stipulated that petitioner was dissolved as a corporate entity under the laws of the State of California in December 1941. The respondent has determined no deficiency against Oat Hill Mine, Inc., for 1941.

On the evidence available we think that petitioner has failed to establish its claim for a deduction of all or any portion of the expenditure in question in the taxable year 1940.

Decisions will be entered under Rule 50. [82]

The Tax Court of the United States
Washington

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 14, 1943, the respondent herein having filed a recomputation of tax on August 10, 1943, and petitioner having filed an acquiescence therein on August 10, 1943, now, therefore, it is

Ordered and Decided: That there are deficiencies in income tax of $107.22, $4,883.21, and $9,879.94 for the fiscal years ended June 30, 1939, June 30, 1940, and June 30, 1941, respectively.

[Seal] (Sgd) CHARLES P. SMITH
Judge

Entered Aug. 13, 1943. [83]

The Tax Court of the United States
Washington

Docket No. 112387

KLAU MINES, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 14, 1943, the respondent herein having filed a recomputation of tax on August 10, 1943, and petitioner having filed an acquiescence therein on August 10, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of $3,834.70 for the calendar year 1940, and that there is no deficiency in declared value excess profits tax for the calendar year 1940.

[Seal] (Sgd) CHARLES P. SMITH
Judge.

Entered Aug 13 1943. [83a]

The Tax Court of the United States
Washington

Docket No. 112388

OAT HILL MINE, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 14, 1943, the respondent herein having filed a recomputation of tax on August 10, 1943, and petitioner having filed an acquiescence therein on August 10, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of $2,025.10 for the calendar year 1940.

[Seal] (Sgd) CHARLES P. SMITH
Judge.

Entered Aug. 13 1943. [83b]

The Tax Court of the United States
Washington

Docket No. 112389

WILD HORSE QUICKSILVER MINING CO.
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated July 14, 1943, the respondent herein having filed a recomputation of tax on August 10, 1943, and petitioner having filed an acquiescence therein on August 10, 1943, now, therefore, it is

Ordered and Decided: That there is a deficiency in income tax of $1,344.63 for the fiscal year ended September 30, 1940.

[Seal] (Sgd) CHARLES P. SMITH
Judge.

Entered Aug. 13 1943. [83c]

In the United States Circuit Court of Appeals
For the Ninth Circuit

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Petitioner, New Idria Quicksilver Mining Company, files this petition in pursuance of the provisions of Section 1142 of the Internal Revenue Code, and asks a review of the decision of the United States Tax Court entered on the 13th day of August, 1943, approving Respondent's assessment of a deficiency in income taxes of petitioner for the respective corporate years ending June 30, 1939 in the amount of $107.22, June 30, 1940 in the amount of $4,883.21, and June 30, 1941 in the amount of $9,879.94. [84]

In support of this petition, petitioner respectfully shows to this Honorable Court:

I.

STATEMENT OF THE NATURE OF THE CONTROVERSY

The nature of the controversy involves an appeal from a redetermination by the Commissioner of Internal Revenue of income taxes of petitioner based on the contention that petitioner had incorrectly computed percentage depletion on income from its quicksilver mine located in San Benito County, California, in making its income tax returns for each of the above-mentioned fiscal years.

II.

DESIGNATION OF COURT OF REVIEW

Petitioner is a corporation organized under the laws of the State of Nevada, duly domiciled and having its principal place of business in the City and County of San Francisco, State of California, and being aggrieved by the said Findings of Fact, Opinion, Decision and Order, asks a review thereof in accordance with the provisions of the Revenue Act of 1926 and the Acts amendatory thereof and supplemental thereto, by the United States Circuit Court of Appeals for the Ninth Circuit within which circuit is located the office of the Collector of Internal Revenue for the First District of California with whom the petitioner made and filed its returns of income and excess profits taxes. [85]

III.

ASSIGNMENTS OF ERROR

Petitioner, as a basis for review, makes the following assignments of error:

1. The Tax Court erred in upholding the Commissioner's method of computing allowable depletion on the properties owned by petitioner for each of the fiscal years in question.

2. The Tax Court erred in upholding the Commissioner's contention that the depletion allowed by him for each of the fiscal years in question was based by him on 15% of the gross income from the property, or 50% of the net income therefrom, whichever was lower, as used in United States Revenue Code Section 114-b.

3. The Tax Court erred in upholding the Commissioner's failure to determine the fair market value of the first marketable product from petitioner's mine as constituting the gross income as a basis for the purpose of computing percentage depletion under the provision of Regulation 103 of the Bureau of Internal Revenue, Section 1923(m)-1, for each of the fiscal years in question.

4. The Tax Court erred in holding as a basis for the deduction specified in the foregoing assignments that quicksilver ore was the first marketable product derived from petitioner's operations, whereas it appears from the undisputed facts in the record that quicksilver metal or mercury was and is the first marketable product derived from said operations. [86]

5. The Tax Court erred in not accepting as the gross income from said property as a basis for the purpose of computing percentage depletion allowance to petitioner in its income tax return the gross return from sales of mercury derived from said properties, as shown by undisputed facts in the record, for each of the said fiscal years in question.

6. The Tax Court erred in upholding the ruling of the Commissioner to the effect that the gross income from petitioner's property during each of said fiscal years in question should be determined by deducting from the gross proceeds of sales of metal the amounts claimed by the Commissioner, or any other amounts, representing the cost of furnacing, condensing, cleaning and flasking the ores extracted from petitioner's mine, and separate error is alleged as to each of said items of deduction.

7. The Tax Court erred in subtracting from the gross income to petitioner from sales of quicksilver metal from petitioner's property during each of said fiscal years in question the amount claimed by the Commissioner, or any other amount, purporting to represent the proportion of petitioner's operating profit alleged to have been derived from the operations of furnacing, condensing, cleaning and flasking said ores extracted from petitioner's property, or the metal contained therein, or from any of said items.

8. The Tax Court erred in assuming as a basis for said deduction that any profit whatever was derived by petitioner from the operations of fur-

nacing, cleaning, condensing and [87] flasking of quicksilver ore mined and extracted from petitioner's property during the period in question, and in failing to assume that such profit as petitioner derived from such operations was ascribable wholly to the existence of quicksilver ore in petitioner's mine and of an open market for the metal extracted therefrom and processed thereon.

9. The Tax Court erred in sustaining the Commissioner's contention that the gross income from the property as defined by the United States Revenue Code, Section 114-b, as a basis for percentage depletion, can be ascertained by arbitrarily adding to the cost of mining and crushing ore extracted therefrom a percentage of the net profit from sales equal to the proportion that the cost of mining and crushing bore to the total cost of mining, crushing, furnacing, condensing, cleaning, flasking, and transporting the metal to market, and all other costs of operation.

10. The Tax Court erred in sustaining the Commissioner's ruling that petitioner was not entitled to claim percentage depletion on the income from ore mined and extracted from dumps on petitioner's property, which dumps contained ore extracted from the identical property on which said dumps were located which was originally mined by petitioner's predecessors in interest from said property and as to which no depletion allowance had ever been previously claimed, either by petitioner or by its predecessors in interest. [88]

Wherefore, your petitioner prays that this Hon-

orable Court may review such findings, decision, opinion, and order of said Tax Court and reverse and set aside the same, and that the Clerk of said United States Tax Court be directed to transmit and deliver to the Clerk of this Court certified copies of all and every documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said Court and the statutes made and provided.

ROBERT M. SEARLS
Attorney for Petitioner

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943.

[Clerk's Note: A separate Petition for Review was filed by each of the petitioners Klau Mine, Inc., Oat Hill Mine, Inc., and Wild Horse Quicksilver Mining Co. in their respective causes on October 12, 1943.] [89]

The Tax Court of the United States

Docket No. 112386

In the Matter of:

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NOTICE OF INTENTION TO FILE PETITION FOR REVIEW

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.,
Attorney for Respondent:

Sir:

Please take notice that on the 12th day of October, 1943, the undersigned will present to this Court and file with the clerk thereof, the petition of New Idria Quicksilver Mining Company, a corporation, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Ninth Circuit, of the final order and decision of the Tax Court in the above entitled proceeding entered upon the records of said court on the 13th day of August, 1943.

ROBERT M. SEARLS
Attorney for Petitioner
705 Standard Oil Building
San Francisco, California

A copy of the within notice and copy of petition for review is hereby accepted this 12th day of October, 1943.

J. P. WENCHEL
Chief Counsel,
Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943. [90]

[Title of Tax Court and Cause.]

Docket No. 112386

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of The Tax Court of the United States:

You are requested by petitioner to take and certify a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to review taken in the above entitled cause, and to include in such transcript of record copies, duly certified as correct, of the following documents:

1. The docket entries or proceedings before the Board.
2. Pleadings before the Board.
   a. Petition.
   b. Amended Answer of Respondent.
3. Transcript of the hearing.
   a. Stipulation as to facts entered into between the parties and filed on hearing of the cause, and exhibits.

b. Statement of evidence in addition to the above stipulation, together with oral motions made at said hearing, and ruling thereon, and exhibits, if any.

4. Memorandum opinion of the Court.

5. Order of redetermination entered on the 13th day of August, 1943.

6. Petition for Review. [91]

a. Notice of filing thereof with proof of service.

7. This praecipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

ROBERT M. SEARLS
Attorney for Petitioner

I hereby consent to the foregoing praecipe.

(Sgd) J. P. WENCHEL
CAK
Bureau of Internal Revenue
Attorney for Commissioner of Internal Revenue

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943. [92]

[Title of Tax Court and Cause.]

Docket No. 112386

NOTICE OF FILING PRAECIPE

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.
Attorney for Respondent:

Please Take Notice that on the 12th day of October, 1943, we filed with the Clerk of the Board of Tax Appeals a praecipe designating the portions of the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit on review taken in the above cause, a copy of which praecipe is hereto annexed and herewith served upon you.

ROBERT M. SEARLS
Attorney for Petitioner.

Service of the foregoing Notice, and copy of the attached praecipe is hereby acknowledged this 12th day of October, 1943.

J. P. WENCHEL
C.A.R.
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed Oct. 12, 1943. [93]

The Tax Court of the United States
Washington

Docket No. 112386

NEW IDRIA QUICKSILVER MINING COMPANY, a corporation,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 93, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of October, 1943.

[Seal] B. D. GAMBLE
Clerk,
The Tax Court of the United States.

[Endorsed]: Nos. 10589, 10590, 10591, 10592. United States Circuit Court of Appeals for the Ninth Circuit. New Idria Quicksilver Mining Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Klau Mine, Inc., a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Oat Hill Mine, Inc., a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Wild Horse Quicksilver Mining Co., a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcripts of the Record. Upon Petitions to Review Decisions of the Tax Court of the United States.

Filed October 25, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit
Consolidated Dockets

No. 10,589

NEW IDRIA QUICKSILVER MINING COMPANY (a corporation)
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10,590

KLAU MINE, INC. (a corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10,591

OAT HILL MINE, INC. (a dissolved corporation),
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 10,592

WILD HORSE QUICKSILVER MINING COMPANY (a dissolved corporation)

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STIPULATION AND ORDER FOR CONSOLIDATION OF CASES FOR PRINTING OF RECORD, BRIEFING AND DECISION

Whereas, duly certified records on appeal have been filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled matters; and

Whereas, the points on appeal relied upon by petitioner in the case entitled New Idria Quicksilver Mining Company v. Commissioner of Internal Revenue (Docket No. 10,589), hereinafter called the "New Idria case," include all of the points which are relied upon in the other three cases, with the exception of one point made in the case of Oat Hill Mine, Inc. v. Commissioner of Internal Revenue (Docket No. 10,591); and

Whereas, said causes were consolidated for hearing and decision in the Tax Court of the United States, and a single opinion and findings was entered by that court in all four of said cases; and

Whereas, pursuant to stipulation between counsel for petitioner and respondent below, the entire rec-

ord of oral testimony at the hearing before the Tax Court has been reduced to narrative form and, together with the opinion of the Tax Court, has been included and certified to this court in the record in the New Idria case, with cross references thereto by copies of the stipulation incorporated in each of the records in the other three cases; and

Whereas, by reason of the foregoing matters it appears to undersigned counsel that the court will be able to decide all four of said cases upon a consolidated printed record including the record in the New Idria case, supplemented by the excerpts from the records of the other three cases above mentioned which are referrd to in this stipulation, and substantial and needless expense will be saved to the petitioners if only one such record is printed under the circumstances, and if the cases are consolidated for briefing and decision;

Now, Therefore, in consideration of the premises,

It Is Hereby Stipulated that the Circuit Court of Appeals for the Ninth Circuit may make and enter an order:

(1) Consolidating said cases for briefing and decision;

(2) Directing that the records in said cases may be consolidated for printing and that only the record in Docket No. 10,589, entitled New Idria Quicksilver Mining Company v. Commissioner of Internal Revenue, shall be printed, together with the following excerpts from the records in the remaining cases, viz.:

Docket No. 10,590—Klau Mine, Inc.:

Paragraphs 10 and 11 from the Stipulation of Facts and the final decision of the Tax Court fixing the amount of the tax deficiency;

Docket No. 10,591—Oat Hill Mine, Inc.:

Paragraphs 10, 11, and 12, and Exhibit "B" to the Stipulation of Facts and the final decision of the Tax Court, fixing the amount of tax deficiency;

Docket No. 10,592—Wild Horse Quicksilver Mining Company:

Paragraphs 10 and 11 from the Stipulation of Facts and the final decision of the Tax Court, fixing the amount of tax deficiency;

(3) That the court, in deciding said cases, need not consider portions of the certified records in Dockets Nos. 10,590, 10,591, and 10,592 which are not printed in the consolidated record on appeal, unless counsel for either party, by printing such excepted portions in their briefs, or some excerpts therefrom, direct the court's attention to matters omitted from the printed record, and that the court need not deem it necessary in deciding the cases to consider any portion of the record not printed in the consolidated record.

Dated: November 1, 1943.

ROBERT M. SEARLS
705 Standard Oil Building,
San Francisco 4, California.
Attorney for Petitioners
SAMUEL O. CLARK JR.
Attorney for Respondent

Pursuant to the foregoing Stipulation

It Is So Ordered by the Court.

Dated: Nov 5 1943.

FRANCIS A. GARRECHT
U. S. Circuit Judge

[Endorsed]: Filed Nov. 5, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Causes.]

PETITIONER'S DESIGNATION OF RECORD TO BE PRINTED IN THE RECORD ON APPEAL

The petitioner above named, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of The Tax Court of the United States rendered in each of the above entitled cases, pursuant to stipulation of counsel and order of court consolidating the above entitled cases for printing of record, briefing and decision, designates all of the record on appeal in Docket No. 10,589 for printing, and, in addition thereto, said stipulation, the portions of records

in Dockets Nos. 10,590, 10,591 and 10,592 referred to therein, and this Designation of Record.

Dated: November 1st, 1943.

ROBERT M. SEARLS
705 Standard Oil Building,
San Francisco 4, California
Attorney for Petitioners

Service of the within Designation of Record to Be Printed in the Record on Appeal admitted this 1st day of November, 1943.

SAMUEL O. CLARK, JR.
Attorney for Respondent

[Endorsed]: Filed Nov. 5, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Causes.]

STATEMENT OF POINTS RELIED UPON BY PETITIONER ON APPEAL

A. In All the Above Entitled Cases:

Petitioner assigns the following as the statement of points upon which it intends to rely on appeal, namely:

(1) The Tax Court of the United States erred in upholding the Commissioner's method of computing allowable depletion on the properties owned by petitioner for each of the taxable years in question.

(2) The Tax Court erred in upholding the Commissioner's contention that the depletion allowed

by him for each of the taxable years in question was based by him on 15 per cent of the gross income from the property, or 50 per cent of the net income therefrom, whichever was lower, as required by United States Revenue Code Section 114-b.

(3) The Tax Court erred in upholding the Commissioner's failure to determine the fair market value of the first marketable product from petitioner's mine as constituting the gross income from the property as a basis for computation of percentage depletion under the provisions of Regulations 103 of the Bureau of Internal Revenue, Section 19.23 (m)-1 for each of the taxable years in question.

(4) The Tax Court erred in holding as a basis for the deduction specified in the foregoing assignments that quicksilver ore was the first marketable product derived from petitioner's operations, whereas it appears from the undisputed facts in the record that quicksilver metal or mercury was and is the first marketable product derived from said operations.

(5) The Tax Court erred in not accepting as the gross income from said property as a basis for the purpose of computing percentage depletion allowance to petitioner in its income tax return the gross return from sales of mercury derived from said properties, as shown by undisputed facts in the record, for each of the said taxable years in question.

(6) The Tax Court erred in upholding the ruling of the Commissioner to the effect that the gross

income from petitioner's property during each of said taxable years in question should be determined by deducting from the gross proceeds of sales of metal the amounts claimed by the Commissioner, or any other amounts, representing the cost of furnacing, condensing, cleaning and flasking the ores extracted from petitioner's mine, and sperate error is alleged as to each of said items of deduction.

(7) The Tax Court erred in subtracting from the gross income to petitioner from sales of quicksilver metal from petitioner's property during each of said taxable years in question the amount claimed by the Commissioner, or any other amount, purporting to represent the proportion of petitioner's operating profit alleged to have been derived from the operations of furnacing, condensing, cleaning and flasking said ores extracted from petitioner's property, or the metal contained therein, or from any of said items.

(8) The Tax Court erred in assuming as a basis for said deduction that any profit whatever was derived by petitioner from the operations of furnacing, cleaning, condensing and flasking of quicksilver ore mined and extracted from petitioner's property during the period in question, and in failing to assume that such profit as petitioner derived from such operations was ascribable wholly to the existence of quicksilver ore in petitioner's mine and of an open market for the metal extracted therefrom and processed thereon.

(9) The Tax Court erred in sustaining the Commissioner's contention that the gross income from

the property as defined by the United States Revenue Code, Section 114-b, as a basis for percentage depletion, can be ascertained by arbitrarily adding to the cost of mining and crushing ore extracted therefrom a percentage of the net profit from sales equal to the proportion that the cost of mining and crushing bore to the total cost of mining, crushing, furnacing, condensing, cleaning, flasking, and transporting the metal to market, and all other costs of operation.

B. In Docket No. 10,589 Only:

(10) The Tax Court erred in sustaining the Commissioner's ruling that petitioner was not entitled to claim percentage depletion on the income from ore mined and extracted from dumps where it appeared without dispute that said dumps were situated on petitioner's property and contained ore previously mined from the identical property on which they were situated by petitioner's predecessor in title to said property and as to which ore no depletion had ever been previously claimed either by petitioner or by any of its predecessors in interest.

C. In Docket No. 10, 591 Only:

(11) The Tax Court erred in sustaining the Commissioner's ruling that petitioner was not entitled to claim deduction as an operating expense during said taxable year in the sum of $3,750.00 representing a payment made to Pacific Gas and Electric Company as a payment for power service.

Dated: November 1st, 1943.

ROBERT M. SEARLS
705 Standard Oil Building
San Francisco, California
Attorney for Petitioner

Service of the within Statement of Points Relied Upon by Petitioner, admitted this 1st day of November, 1943.

SAMUEL O. CLARK, Jr.
Attorney for Respondent

[Endorsed]: Filed Nov. 5, 1943. Paul P. O'Brien, Clerk.

Nos. 10,589, 10,590, 10,591, 10,592

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW IDRIA QUICKSILVER MINING COMPANY (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,589
KLAU MINE, INC. (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,590
OAT HILL MINE, INC. (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,591
WILD HORSE QUICKSILVER MINING CO. (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,592

On Petition for Review of Decisions of the Tax Court of the United States.

BRIEF FOR PETITIONERS.

ROBERT M. SEARLS,
Standard Oil Building, San Francisco 4, California,
Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Nos. 10,589, 10,590, 10,591, 10,592

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW IDRIA QUICKSILVER MINING COMPANY (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,589
KLAU MINE, INC. (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,590
OAT HILL MINE, INC. (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,591
WILD HORSE QUICKSILVER MINING CO. (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,592

On Petition for Review of Decisions of the Tax Court of the United States.

BRIEF FOR PETITIONERS.

OPINION BELOW.

The opinion of The Tax Court of the United States, together with its findings of fact, is set forth in the

record, pages 89 to 109, and the formal decisions of the Court in each case appear in the record, pages 110 to 113.

JURISDICTION.

This petition for review involves assessed deficiencies in Federal corporate income taxes, as follows:

Docket No. 10,589—New Idria Quicksilver Mining Company:

Fiscal year ended June 30,

1939	$ 107.22
1940	4,883.21
1941	9,879.94

Docket No. 10,590—Klau Mine, Inc.:

Calendar year

1940	$3,834.70

Docket No. 10,591—Oat Hill Mine, Inc.:

Calendar year

1940	$2,025.10

Docket No. 10,592—Wild Horse Quicksilver Mining Co.:

Fiscal year ended September 30,

1940	$1,344.63

Decisions of The Tax Court of the United States approving the above assessments under said respective docket numbers were entered on August 13, 1943. (R. 110-113.) Petitions for review were filed October 12, 1943. The jurisdiction of this Court is invoked under Section 1141, Title 26, U.S.C.A. by the petitioners, all of whose returns were filed in collector's offices located

within the Ninth Circuit. A consolidated record on review and a stipulation for consolidation of all four cases for briefing and decision on review is submitted. (R. 127-129.)

QUESTIONS PRESENTED.

The questions presented on review may be summarized briefly under the following headings:

(1) Whether the petitioners correctly computed percentage depletion in rendering their respective corporate income tax returns for the years in question;

(2) Whether the petitioner New Idria Quicksilver Mining Company was entitled to deduct percentage depletion on ore mined from certain dumps on its property;

(3) Whether petitioner Oat Hill Mine, Inc. was entitled to deduct as an operating expense certain service charge deposits required by the power company serving said petitioner with electric energy during the years in question.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the Appendix, *infra,* pages i-vi.

STATEMENT.

Petitioners, during the years in question and for some years preceding, had been operating quicksilver mines in California and Nevada. New Idria Quicksilver Mining Company owns and operates a quicksilver mine located in San Benito County, California. Klau Mine, Inc. owned and operated during the year in question a quicksilver mine situated in San Luis Obispo County, California. Oat Hill Mine, Inc. leased and operated a quicksilver mine in Napa County, California. Wild Horse Quicksilver Mining Co. owned and operated a quicksilver mine in Churchill County, Nevada.

The sole product produced by each petitioner was quicksilver metal (also known as mercury). With the exception of the metal produced from dumps on the New Idria property, to which reference will later be made, all of this metal was obtained from crude cinnabar ore mined and extracted by surface and underground mining operations. (R. 30.) Subterranean workings consisted of drifts and crosscuts. The ores were broken down by blasting and thereafter sorted. The material which did not contain cinnabar (which is the ore from which quicksilver is produced) was discarded and the cinnabar ore was hauled to the surface by cars. There it was screened and crushed into small particles of two inches or less and carried by conveyors to furnaces. At the New Idria Mine two furnaces were operated. They are of the rotary type, five feet in diameter and fifty-six feet in length, made of iron and lined with fire brick. (R. 30.) At each of the other mines there was only one furnace,

which was a smaller one than at New Idria. The crushed ores are fed into the furnaces and heated to a temperature of about 1200 Fahrenheit. The effect of this heating is to disintegrate the ore and drive off the quicksilver vapors. These vapors as they are released by the heat are drawn from the furnace by suction fans and passed into the condenser system, which consists at the New Idria Mine of two vertical banks of ten pieces of sixteen inch iron pipe each, with rubber buckets at the bottom of the pipes to collect condensed mercury. Similar systems with smaller condensers existed at the other mines. These buckets are emptied on tables where the contents are mixed with slack lime and worked with hoes to cleanse or free the quicksilver. After this operation the quicksilver is practically pure and is flasked for market.

This method of extracting quicksilver is similar in many respects to the method used in extracting free gold from gold ores through the use of stamp mills and amalgamation with quicksilver placed on the plates, over which the ore is washed by water after being crushed by the stamps. The free gold is caught by the quicksilver, amalgamates with it, and is then separated from the amalgam by heating and driving off the mercury vapor. (R. 72.) In both cases the first marketable product recovered from the mine is the metal itself in a practically pure condition.

Experiments have been made from time to time in prior years, by the petitioners and other operators, with different methods such as gravity and flotation

methods, for concentrating the cinnabar ore before furnacing and condensing it. (R. 65-72; 74; 80-81.) None of these experiments have proven successful in the United States for economic reasons. It is physically possible to concentrate cinnabar ore, or we presume, any other ore; but after the quicksilver concentrates are obtained they still have to be roasted in the same manner as the crude ores, and practically no saving in cost is gained by concentration. There are no custom mills in the United States which purchase cinnabar ore or concentrates for reduction. There is no market for cinnabar ore in its crude state. The reason for this is that mercury ores as known in this country are relatively low grade, containing from two to forty pounds of quicksilver to the ton and averaging about five to six pounds. This means that out of every ton of ore transported, 1995 pounds would be rock having no value whatever, and only five pounds would be valuable metal. (R. 66; 79.) For like reason, perhaps in lesser degree, there is no market for quicksilver concentrates, and they are not made in commercial practice. It necessarily follows that each quicksilver mine must have its own furnace, which is just as much an essential element in producing its product as would be the mine hoist or crusher. In no instance is there a marketable product derived from the mine until the ore broken down in the face of workings has been transported to the surface, crushed, roasted, and the quicksilver vapors condensed, cleaned, and placed in flasks. At this point, and not until then, does a marketable product exist at the mine.

In the cases at bar all of these operations were conducted on the respective properties by the owners thereof, and the flasked quicksilver was then sold in the open market. Petitioners' witnesses, all of whom were well qualified to speak, testified, without contradiction, that the roasting of the cinnabar ore and the vaporization and condensation of the quicksilver are similar in effect to the crushing and gravity concentration of gold ores in quartz mills. (Walter Bradley, R. 72; Worthen Bradley, 75; Gould, 80.) No chemicals are added in the furnace. The process is a physical process of adding heat to the crude ore. The disintegration of the ore frees the quicksilver from the other minerals with which it is associated in the ore. Condensation is merely a matter of cooling the vapors.

In the case of the New Idria Mine, there are located on the petitioner's property large dumps containing ore which in years prior to 1913 was mined by former owners of the property from the property on which they are located, but was not furnaced because of its low grade. Mine operations have been carried on on this property continuously since about 1858. (R. 31-34.) These dumps have in some instances been covered with waste and mined in more recent years. Title to them was never severed from the property on which they are located and from which the ores in them came, but the dumps have regularly passed down from owner to owner, and finally in 1936 to the petitioner, as a part of the land on which they were situated, no separate value having ever been assigned

to them. There were also on this same property certain dumps containing partially burned ores which had been discarded from the less efficient furnaces formerly used in roasting ore mined from the property. These burnt ore dumps contain partially burned ore, mined from the same property, from which mercury can be profitably recovered under the modern improved methods of roasting used by petitioner. (R. 83.) No depletion has ever been claimed in tax returns made by former owners covering any of the ore in either of these dumps. (R. 34.)

During the taxable years in question the petitioner mined ores from both these dumps by the use of steam shovels and passed them through its furnaces, thereby obtaining considerable quantities of mercury therefrom in addition to whatever had been formerly extracted by petitioner's predecessors in title. These ores are situated on the same land holding as the furnace, at a distance of about a mile and a half from the roasting plant. The gross sales of quicksilver made and reported by petitioner in its income tax returns during each of the taxable years included the sales of mercury obtained from these dump ores. The returns from dump ores, however, are separately shown in the record. (R. 34.)

There were no dump ores mined from properties of the other three petitioners.

Each of the petitioners elected to claim percentage depletion as a deduction in its income and declared value excess profits tax returns for the taxable years in question, computing this percentage on the total

gross sales of quicksilver from all sources. (R. 95-96.) The respondent Commissioner insisted that there should be deducted from the gross revenue obtained from said sales of quicksilver in each case the costs of transporting, furnacing, condensing, cleaning, and flasking, in amounts which were agreed as representing the cost of such items, together with an assumed profit on each operation which was determined by applying to the total profits from sales of quicksilver that percentage which the cost of each of said operations bore to the total cost of all operations involved in getting the quicksilver from its place in the ground into the market. The Tax Court upheld these contentions. (R. 104.) The effect of these deductions was to treat as gross income from petitioner's property for depletion purposes, the actual cost of mining and crushing the ore, plus the percentage of the total profit which this cost bore to the total costs of all operations. It is not pretended, we repeat, that any crude ore was ever sold at such profit or could have been sold at such profit, or was or could have been sold at all. The calculation of "gross income from the property" was therefore a purely arbitrary calculation which the respondent adopted for the purpose of determining what he considered gross income from the property for depletion purposes. In the case of the New Idria Mine respondent excluded entirely from the depletion base all income from quicksilver derived from ores in the dumps above described and was upheld by the Tax Court in so doing. (R. 106.)

In the case of the Oat Hill Mine, the petitioner had paid to the Pacific Gas and Electric Company in 1940 the sum of $3,750.00, constituting a deposit payment to justify that company in installing an electric transmission line and transformers on petitioner's property. The payment was made under a contract which provided that all of the equipment so installed should remain the property of the Pacific Gas and Electric Company. (R. 58.) Provisions were made in the contract for reimbursement over a long period of time of this line extension deposit if thirty-six months should have elapsed before discontinuance of operations on petitioner's property. The petitioner's manager testified, without contradiction, that in 1940, when this payment was made, the apparent life of the operation at the Oat Hill Mine would not outlast the war, or probably about three years. (R. 83-84.) There would thus be no opportunity for refund of any portion of this deposit. Petitioner deducted this payment to the power company as an operating charge in its income tax return. The respondent refused to allow the deduction, claiming that it was a capital charge, and would not permit the deduction either in one year or its amortization over a period of three years. The Tax Court upheld respondent's disallowance of this item. (R. 107.) Petitioner Oat Hill Mine, Inc. was thus deprived of any deduction for this payment in its income tax returns as an operating expense, although it acquired no capital asset of any kind whatever in return therefor. The record shows that petitioner was dissolved as a corporate entity in December, 1941.

SPECIFICATIONS OF ERROR.

The errors relied upon for reversal of the ruling of the Tax Court may be grouped into three classes:

(1) Errors common to all four cases under review (R. 116-118):

1. The Tax Court erred in upholding the Commissioner's method of computing allowable depletion on the properties owned by petitioner for each of the fiscal years in question.

2. The Tax Court erred in upholding the Commissioner's contention that the depletion allowed by him for each of the fiscal years in question was based by him on 15% of the gross income from the property, or 50% of the net income therefrom, whichever was lower, as used in United States Revenue Code Section 114-b.

3. The Tax Court erred in upholding the Commissioner's failure to determine the fair market value of the first marketable product from petitioner's mine as constituting the gross income as a basis for the purpose of computing percentage depletion under the provision of Regulations 103 of the Bureau of Internal Revenue, Section 19.23 (m)-(1), for each of the fiscal years in question.

4. The Tax Court erred in holding as a basis for the deduction specified in the foregoing assignments that quicksilver ore was the first marketable product derived from petitioner's operations, whereas it appears from the undisputed facts in the record that quicksilver metal or mercury was and is the first marketable product derived from said operations.

5. The Tax Court erred in not accepting as the gross income from said property as a basis for the purpose of computing percentage depletion allowance to petitioner in its income tax return the gross return from sales of mercury derived from said properties, as shown by undisputed facts in the record, for each of the said fiscal years in question.

6. The Tax Court erred in upholding the ruling of the Commissioner to the effect that the gross income from petitioner's property during each of said fiscal years in question should be determined by deducting from the gross proceeds of sales of metal the amounts claimed by the Commissioner, or any other amounts, representing the cost of furnacing, condensing, cleaning and flasking the ores extracted from petitioner's mine, and separate error is alleged as to each of said items of deduction.

7. The Tax Court erred in subtracting from the gross income to petitioner from sales of quicksilver metal from petitioner's property during each of said fiscal years in question the amount claimed by the Commissioner, or any other amount, purporting to represent the proportion of petitioner's operating profit alleged to have been derived from the operations of furnacing, condensing, cleaning and flasking said ores extracted from petitioner's property, or the metal contained therein, or from any of said items.

8. The Tax Court erred in assuming as a basis for said deduction that any profit whatever was derived by petitioner from the operations of furnacing, cleansing, condensing and flasking of quicksilver ore mined

and extracted from petitioner's property during the period in question, and in failing to assume that such profit as petitioner derived from such operations was ascribable wholly to the existence of quicksilver ore in petitioner's mine and of an open market for the metal extracted therefrom and processed thereon.

9. The Tax Court erred in sustaining the Commissioner's contention that the gross income from the property as defined by the United States Revenue Code, Section 114-b, as a basis for percentage depletion, can be ascertained by arbitrarily adding to the cost of mining and crushing ore extracted therefrom a percentage of the net profit from sales equal to the proportion that the cost of mining and crushing bore to the total cost of mining, crushing, furnacing, condensing, cleaning, flasking, and transporting the metal to market, and all other costs of operation.

(2) Error peculiar to the new Idria Quicksilver Mining Company case, Docket No. 10589 (R. 118):

(10) The Tax Court erred in sustaining the Commissioner's ruling in Docket No. 10,589 that petitioner was not entitled to claim percentage depletion on the income from ore mined and extracted from dumps on petitioner's property, which dumps contained ore extracted from the identical property on which said dumps were located, which was originally mined by petitioner's predecessors in interest from said property and as to which no depletion allowance had ever been previously claimed, either by petitioner or by its predecessors in interest.

(3) Error peculiar to the Oat Hill Mine, Inc. case, Docket No. 10591 (R. 134):

(11) The Tax Court erred in sustaining the Commissioner's ruling that petitioner was not entitled to claim deduction as an operating expense during said taxable year in the sum of $3,750.00 representing a payment made to Pacific Gas and Electric Company as a payment for power service.

ARGUMENT.

SUMMARY.

(1) The Tax Court's interpretation of Section 23 (m) of the Internal Revenue Code upholding Rules and Regulations 103, Section 19.23 (m)-1-(f) (4), as interpreted by the Commissioner, amounts to a complete denial of the right of petitioners under Section 114-(b) (4) Internal Revenue Code in ascertaining their corporate income taxes, to a deduction of 15% of the gross income from their properties to cover depletion thereof. (Specifications Nos. 1 and 2.)

(2) The Tax Court's construction of Regulations 103 of the Bureau of Internal Revenue, Section 19.23 (m)-1-(f) (4), as calling for a hypothetical gross revenue from a non-marketable raw material does violence to both the intent of the regulation and its validity if it be subject to such an interpretation. (Specifications Nos. 3, 4 and 5.)

(3) If, as petitioners contend, quicksilver in flasks, ready for market, is the first marketable product at the mine, it necessarily follows that the respondent's

deduction of costs of furnacing, condensing, cleaning and flasking from their gross income from sales of quicksilver was improper, and the Tax Court erred in upholding it. (Specification No. 6.)

(4) To an even greater degree, the Tax Court erred in upholding the arbitrary apportionment and deduction of profit so apportioned to each of these excluded operations adopted by the respondent Commissioner in assessment of petitioners' taxes. (Specifications Nos. 7, 8 and 9.)

(5) Petitioner New Idria Quicksilver Mining Company was entitled to claim percentage depletion on income from ore mined and extracted from dumps on its land which dumps were always an integral part of its property, had never been severed in title therefrom, and as to which no depletion had ever been claimed previously. (Specification No. 10.)

(6) Petitioner Oat Hill Mine, Inc. was entitled to deduct from its tax return the payment made to the Pacific Gas and Electric Company for power service. (Specification No. 11.)

(1) THE TAX COURT'S INTERPRETATION OF SECTION 23 (m) OF THE INTERNAL REVENUE CODE UPHOLDING RULES AND REGULATIONS 103, SECTION 19.23 (m)-1-(f)(4), AS INTERPRETED BY THE COMMISSIONER, AMOUNTS TO A COMPLETE DENIAL OF THE RIGHT OF PETITIONERS UNDER SECTION 114-(b)-(4) INTERNAL REVENUE CODE IN ASCERTAINING THEIR CORPORATE INCOME TAXES, TO A DEDUCTION OF 15% OF THE GROSS INCOME FROM THEIR PROPERTIES TO COVER DEPLETION THEREOF. (SPECIFICATIONS NOS. 1 AND 2.)

In its opinion and findings (R. 101-104) the Tax Court tacitly admits that Regulations 103, Section 19.23 (m)-1-(f) (4), as drafted do not fit the particular conditions of quicksilver mining. Nevertheless the Court says the purpose of the regulations

> "is to compute the percentage depletion allowances for all types of mines on the basis of income attributable to the using up or the 'depletion' of the mineral or metal products as distinguished from the income attributable to the various processes utilized in preparing the product for the market. We can not say that in their plan for furtherance of that purpose the regulations are so contrary to the statute or so out of harmony with the meaning and purpose of the statute as to be invalid." (R. 101.) * * *
>
> "We think that the result which the respondent has reached here by applying his regulations comports with the purpose of section 114 (b) (4) I.R.C. as that section has been construed by the courts. The position taken by the petitioners that their percentage depletion on quicksilver mines should be computed upon the total gross sales of mercury as finally processed is, we think, contrary to the purpose of the statute." (R. 104)

Petitioners assert that the regulations, as interpreted by the respondent and by the Tax Court do violence to the clear intent of Section 114 (b) (4) of the statute, and for that reason are in error. In making this assertion, petitioners have no quarrel with the general principle announced that "gross income from the property" upon which percentage depletion is required to be computed by the provisions of Section 114 (b) (4) is intended to be income from the first marketable product which can be produced from the property and is not to be income attributable to refining or distribution processes. Nevertheless, income is income. It is not a hypothetical calculation of sale values of raw materials as distinguished from the value of the capital asset from which they are produced.

Respondent will undoubtedly concede that ore in the face of the drift is not income, although its discovery may add to the market value of the property as a whole. Respondent will not claim that percentage depletion could or should be computed on that increase in value so long as the ore remains in place. Let us go a step further,—the ore is broken down in the mine by the use of machinery, equipment and labor. It is still not income, or convertible into income, although it is raw material capable of being processed to a degree that it will have a market value and yield income. It has merely been separated from the land from which it came by the use of mining processes. The ore is transported to the mine portal. It is still not income upon which percentage depletion

can be computed, or upon which an income tax should be paid. Respondent does not contend that. In the instant case the ore at the portal of the mine could not be sold. Due to its small mineral content no one would pay the cost of transporting it. The owner has not yet converted it into a marketable product from which alone income could be obtained. The ore is given a primary crushing. This still does not make it income under the respondent's construction of his regulations, even though machinery and labor are involved in that process. The crushed ore is not a marketable product. It could not be sold.

The producer of the ore then takes the next step. He conducts it through a rotary furnace and by simply rotating it and adding heat the mercury vapors are driven off, condensed, and cleaned mechanically from the carbon and other worthless material which has come down with the vapors in condensation. Then for the first time mercury is obtained and is placed in flasks so that it can be handled, shipped and sold. We now have a marketable product—something that can be converted by sale into income from the property and it is the first marketable product that has been obtained in the whole operation. At no time prior to the pouring of this metallic mercury into the flasks has the owner had anything that he can sell to anybody who would be willing to buy it, or which could be treated as an economic entity, separate from the property from which it came. The record is absolutely without dispute as to these facts. The situation is not peculiar to petitioners' mines. It

is common to the entire quicksilver industry throughout the United States.

The question then arises as to whether the beneficiation of the ore which took place in the rotary furnace and in the condenser system is in any different legal category than the preceding processes of mining and crushing which were necessary to extract the ore from the ground, bring it to the surface and rendered it workable. We can perceive no legal distinction. If mercury ore at the mouth of the mine were salable, as, for example, wet gas is salable at the mouth of an oil well to a gasoline processing company, or as high grade ore might be salable to a custom mill, we could see some basis for the contention that further processing of the gas or ore would amount to an increase in the market value of the product over that which existed at the mouth of the mine due to a manufacturing process. But this is not true of quicksilver ores, either in petitioners' mines or elsewhere in this country.

We say therefore that the construction by the Commissioner and the Tax Court of Regulations 103 does violence to the manifest intent of both the regulation and the statute upon which it is based. Regulations 103, Sec. 19.23 (m)-1-(f)-(4), provide that in the case of ores "which are not customarily sold in the form of the crude mineral product" there should be no deduction in arriving at gross income from the cost of crushing and concentrating (by gravity or flotation) and other processes to the extent to which they

do not beneficiate the product in greater degree (in relation to the crude mineral product on the one hand and the refined product on the other) than crushing and concentrating (by gravity or flotation).

It was the obvious intent of this regulation, if we read it correctly, that no deduction should be made from gross income for the cost of such beneficiation processes as would bring a non-salable crude mineral product to the first stage at which it could be sold and disposed of in the market. In the case of the ores enumerated in the regulation, namely, lead, zinc, copper, gold and silver ores, it is ordinarily, though not always true that concentrates can be produced by gravity or flotation processes which will give a marketable product, one that could either be still further refined on the producer's premises or sold to a commercial smelter or refinery. Thus, even if in those cases actual money were not received for the crushed and concentrated ore by the producer, he would have a product which could be converted into cash income, and the salable value of that product might very well be taken as "gross income from the property" within the meaning of Section 114 (b) (4). However, where —as in the case of quicksilver mines—no salable product is produced by crushing; where concentration has proven to be uneconomical and is never used in practice; we say and petitioners' witnesses say that the roasting and condensing process does not beneficiate the crude mineral in any *relatively* greater degree than crushing and concentration would in the case of marketable concentrates.

The attempt which the Tax Court has made in response to the respondent's argument to create a hypothetical market value which does not and could not exist and then call it "gross income" amounts to a direct violation of the express language of Section 114 (b) (4), which entitles the petitioners to compute percentage depletion on the basis of the gross income from the property. Such interpretations have not been approved by the Courts. We refer first to the case cited by the Tax Court itself as supporting its construction. (R. 101.)

> *Commissioner of Internal Revenue v. Winslow,* 113 Fed. (2d) 418 (C.C.A. 1–1940), at 423:
>
> "(8, 9) The Commissioner of Internal Revenue has authority to prescribe rules and regulations to administer the Revenue Act of 1934, under the power conferred upon him by Section 62 thereof. Sec. 62, 48 Stat. 700, 26 U.S.C.A. Internal Revenue Acts, page 687. Any regulation consistent with the law is valid and its promulgation a proper exercise of the power conferred upon him, but it does not empower him to change or alter the law.
>
> 'The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law * * * but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.' Manhattan Co. v. Commissioner, 1936, 297 U. S. 129, 134, 56 S. Ct. 397, 400, 80 L. Ed. 528; Cf. Miller v. United States,

1935, 294 U. S. 435, 439, 55 S. Ct. 440, 79 L. Ed. 977.

'* * * although it is true that where an Act uses ambiguous terms or is of doubtful construction, a clarifying regulation or one indicating the method of an Act's application to specific cases is to be given weight by the courts, the interpretation of a statute always remains the function of the judiciary. The regulation cannot change what the Act originally meant.' Saks v. Higgins, D.C.S.D.N.Y. 1939, 29 F. Supp. 996, 999; cf. Fresno Grape Products Corp. v. United States, Ct. Cls. 1935, 11 F. Supp. 55, 59.

(10) Article 22 (b) (1) of Treasury Regulations 86, as sought to be applied by the Commissioner to the facts in this case, is contrary to the expressed intention of Congress and is invalid."

This principle has been upheld by the Supreme Court of the United States repeatedly. We refer to *Manhattan General Equipment Company v. Commissioner of Internal Revenue,* 297 U.S. 129, 134, 80 L. Ed. 528, 531:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co., 265 U.S. 315, 320-322, 68 L. ed. 1034-1036, 44 S. Ct. 488; Miller v. United States, 294 U. S. 435, 439, 440,

79 L. ed. 977, 980, 981, 55 S. Ct. 440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. International R. Co. v. Davidson, 257 U.S. 506, 514, 66 L. ed. 341, 346, 42 L. ed. 179. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable."

A Treasury regulation may not expand or contract the scope of a Congressional Act. It merely interprets it.

M. E. Blatt Co. v. United States, 305 U.S. 267, 279 (83 L. Ed. 167, 172).

"Treasury regulations can add nothing to income as defined by Congress."

Maass v. Higgins, 312 U.S. 443, 447 (85 L. Ed. 940, 132 A.L.R. 1035, 1037:

"On the other hand, the petitioners insist that the Government's position is unreal and artificial; that it does not comport either with economic theory or business practice; and that the regulation is an unwarranted extension of the plain meaning of the statute and cannot, therefore, be sustained. We hold that the petitioners are right."

Bowers v. West Virginia Pulp & Paper Co., 297 Fed. 225 (C.C.A. 2–1924):

"Changes in Treasury decisions do not change the law, but merely announce a change in some official's opinion about the law."

It is further ruled by the Courts that the Treasury may not depart from the realities of facts in making its regulations and base them on abstract logic (or much less, upon the lack of any logic, as is the case here).

We refer to the case of

Helvering v. Safe Deposit & Trust Co. of Baltimore, 95 Fed. (2d) (C.C.A. 4–1938), 806, 810.

In this case it was held that the Commissioner's interpretation of Section 303, Revenue Act of 1926, which required an estate tax to be based on the market value of property at date of death, as justifying a valuation of 25,000 shares of stock on the basis of what a small number of shares sold for on that date, created a rule out of harmony with the statute. Such a rule is not to be given weight as an executive determination.

Section 23 (m) of the Internal Revenue Code providing for a reasonable allowance for depletion in the case of mines to be made under rules and regulations to be prescribed by the Commissioner, does not, we submit, detract in any way from the mandatory language of Section 114 (b) (4), which allows percentage depletion in the case of metal mines to be taken in an amount equal to 15 per cent of the gross income from the property. The two sections are to be read together.

In *Commodore Mining Co. v. Commissioner of Internal Revenue,* 111 F. (2d) 131 (C.C.A. 10–1940), it was held (p. 133):

> "* * * But all of these provisions must be read and considered together as parts of the whole. Section 23 (m) cannot be segregated and construed to grant a right to a deduction to be computed on any basis other than that provided in section 114. That Congress intended in Section 23 (m) to grant in the case of a metal mine a deduction to be computed in the manner set forth in section 114, and not otherwise, is plain."

The permission granted the Commissioner under Section 23 (m) to prescribe rules and regulations certainly cannot be interpreted as entitling him to depart from the mandatory language of Section 114 (b) (4) basing percentage depletion allowance upon "gross income from the property". If the respondent in computing that gross income may lawfully deduct the cost of furnacing, condensing and flasking the mercury vapors, we assert that he might with equal propriety deduct the cost of crushing, transporting the ore to the mine mouth and breaking it down in the face. All of these acts require the employment of labor and equipment, probably no less in value or magnitude than that required for the simple operation of furnacing and condensing. If the Commissioner may lawfully deduct the cost of a part of the operations necessary to get a marketable product, why may he not deduct the cost of all of them? Then we would have depletion based on *15 per cent of the net income,* whereas Section 114 (b) (4) says the alternative limit of percentage depletion is to be *50* per cent of the net income. The statute expressly gives the taxpayer the right to depletion based on

15 per cent of the *gross,* but not exceeding 50 per cent of the *net.* In this particular instance the Commissioner has not gone so far as to deduct all of the costs, but if the construction the Tax Court places upon Regulations 103, Sec. 19.23 (m)-1-(f) (4), is correct, there seems to be no good reason why he may not defeat the intent of Section 114 (b) (4) of the statute altogether and limit the taxpayer to 15 per cent of the net income rather than the gross. See,

Ambassador Petroleum Co. v. Commissioner of Internal Revenue, 81 Fed. (2d) 474 (C.C.A. 9–1936),

where it was held (p. 477):

> "It can therefore be seen that the administrative and legislative history of the 1926 statute establishes that 'net income * * * from the property' and 'operating profit' are synonymous."

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(2) THE TAX COURT'S CONSTRUCTION OF REGULATIONS 103 OF THE BUREAU OF INTERNAL REVENUE, SECTION 19.23 (m)-1-(f)(4) AS CALLING FOR A HYPOTHETICAL GROSS REVENUE FROM A NON-MARKETABLE RAW MATERIAL DOES VIOLENCE TO BOTH THE INTENT OF THE REGULATION AND ITS VALIDITY IF IT BE SUBJECT TO SUCH AN INTERPRETATION. (SPECIFICATIONS NOS. 3, 4 AND 5.)

A portion of the argument we have made under the first point undoubtedly supports our second point as well. We do assert, however, that it was never the intent of Congress in enacting Section 114 (b) (4) that the Treasury Department should have the right to go so far as it has gone in its interpretation of Section 23 (m), I.R.C., by Regulation 103,

Sec. 19.23 (m)-1-(f), and that Congress has never given such interpretation any support. The position of the present Secretary of the Treasury in connection with percentage depletion allowances in general on mineral properties is so well publicized as to be of general knowledge. Each year he has, through his representative, appeared before the House and Senate Committees urging the entire abolition of percentage depletion, and each year his requests have been denied by the Congress. This attitude of the Treasury has given rise to Congressional debates.

The intent of Congress in using the words "gross income from the property" in the Revenue Acts as a basis for percentage depletion, has been argued and considered by Congress and its committees. The latest expression of the intent of Congress may be found in the record of the debate on the Senate floor on adoption of the 1942 Act, at page 8291, of the Congressional Record for that year. Senator George, Chairman of the Senate Finance Committee, had the floor, and was explaining the Revenue Act. Senator Johnson of Colorado was another member of the Senate Finance Committee. Senator Thomas of Idaho was interested in ascertaining the attitude of the Treasury on this very question, and the following debate took place:

> "Mr. George. I yield to the Senator from Idaho. I understand he has a matter which he wishes to present.
>
> Mr. Thomas of Idaho. Mr. President, I should like to have the attention of the senior Senator from Colorado. (Mr. Johnson.)

Mr. George. Yes; I should like to have the Senator from Colorado give attention to what the Senator from Idaho wishes to say.

Mr. Thomas of Idaho. When the amendments providing for percentage depletion were under consideration in 1932, it was our understanding that the ordinary treatment processes which a mine operator would normally apply in order to obtain a suitable product should be considered as a part of the mining operation. Is any change in that law proposed at this time?

Mr. Johnson of Colorado. Mr. President, I am glad the Senator brought up that subject, because it is one in which the Senator from Colorado has been very much interested, and it has been discussed in the Senate Finance Committee at considerable length. I am especially interested in the beneficiation of quicksilver, although no quicksilver is produced in the State of Colorado. But we have been met with this sort of situation with respect to quicksilver. If the producers of quicksilver will follow a certain process of beneficiation, they will receive the benefits of depletion fully, but if they adopt a more scientific method and a more modern method, then, of course, they run immediately into certain difficulties. That, to me, is something which is directly opposed to the public interest, and especially when we need quicksilver as badly as we do.

The question of what constitutes net income attributable to the mining of strategic metals and the companion questions regarding gross and net income from the property for percentage depletion have been considered with Mr. Randolph

Paul, who has represented the Treasury before the Finance Committee on this subject. Mr. Paul urged that this was a subject which should be covered by Treasury regulations rather than by detailed provisions of the law. I agree that the statutes should not be burdened with regulatory details to fit every possible contingency. I hope the Senator from Idaho will not offer an amendment on the subject at this time.

**The Congress has not intended in the pending measure to make any change in its concept of mining income from that expressed in the 1932 and 1934 acts, nor to establish by implication or otherwise any approval of Treasury regulation or Revenue Bureau practice which departs from the original acts or the general Bureau practice prior to 1940.*

I have conferred with Mr. Paul and he has stated to me the Treasury's intention to adhere to the original regulations and procedures under these acts, so that concentration by gravity or flotation and equivalent processes would be considered as part of the mining operation. *Thus, for example, the furnacing of quicksilver ores would be considered as an equivalent of concentration by gravity or flotation.*

Mr. Paul made only one exception to the original regulations; namely, that there would be excluded from gross income from the property not only the cost of further processes such as smelting, but also the profits if any, attributable thereto; intending thus to make the charges for

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*Italics used in this brief supplied unless otherwise noted.

a mining company's own smelter compare with those of an independent custom smelter.

Mr. President, does that explain the situation to the Senator from Idaho, and is he satisfied with the explanation?

Mr. Thomas of Idaho. Mr. President, I think with that explanation, the situation is entirely satisfactory. *What I was particularly anxious to know was whether the provision in question would make any changes in the matter of depletion in the operations to which I referred. I was very active in 1932 in connection with the passage of the legislation on the subject. The same system is still being followed, I understand.*

Mr. Johnson of Colorado. *Yes; the same system is being followed.* I know the Senator from Idaho took a very active part in having the legislation adopted in 1932. The Senator himself sponsored an amendment with respect to depletion in connection with the mining operations to which he referred."

The admissibility of such debates in interpreting the meaning of a Congressional Act was recently upheld by the Supreme Court of the United States in the case of *United States v. City and County of San Francisco,* 310 U. S. 16, 21, 84 L. Ed. 1050, 1055, where Mr. Justice Black, in writing the prevailing decision, quoted copiously from statements of senators and congressmen made during debates on a public land grant.

See also:

Standard Oil Co. v. United States, 221 U. S. 1, 50; 55 L. Ed. 619, 641,

and

Helvering v. Twin Bell Oil Syndicate, 293 U. S. 312, 322, 79 L. Ed. 383, 389.

We submit that the foregoing debate which ensued just prior to the enactment of the 1942 Revenue Act shows that Congress has never at any time countenanced the departure from the meaning of gross income as we have defined it. The debate was held during the address of Chairman George of the Senate Finance Committee, who had the bill in charge, and so far as the Congressional Record shows he acquiesced without comment in the interpretation placed upon the law by Senators Thomas and Johnson. The attitude of the Commissioner in this case is at distinct variance with the attitude of Mr. Paul, Treasury representative, as stated by Senator Johnson.

Most of the authorities interpreting Section 114 (b) (4) do not directly deal with metal mine products. There are, however, a number of cases which the Tax Court has cited as authority for its position, and we proceed to analyze them briefly, pointing out that they do not sustain the ruling made in this case.

Eisner v. Macomber, 252 U. S. 189, 207, 64 L. Ed. 521, 529, cited in the Tax Court's opinion (R. 102), defines income as follows:

> "* * * 'Income may be defined as the gain derived from capital, from labor, or from both

combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case (pp. 183, 185).

Brief as it is, it indicates the characteristic and distinguishing attribute of income, essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain', which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived,—*'derived—from—capital';—'the gain—derived—from—capital',* etc. Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in,* being *'derived',* that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit, and disposal; *that* is income derived from property. Nothing else answers the description."

It is clear from this language of the Supreme Court that income cannot be considered as hypothetical increment to the value of petitioners' capital. *There must be an actual reduction to realized or realizable money value and there cannot be any such status until a marketable product is obtained.*

The Tax Court also cites *Crews v. Commissioner of Internal Revenue,* 89 Fed. (2d) 412 (C.C.A. 10–

1937). This case contains the following language at pages 415-416:

> "Income from property is a gain, a profit, something of exchangeable value derived from the property, that is received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal. Eisner v. Macomber, 252 U. S. 189, 207, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570; Merchants' L. & T. Co. v. Smietanka, 255 U. S. 509, 520, 41 S. Ct. 386, 65 L. Ed. 751, 15 A.L.R. 1305; Commissioner v. Independent Life Ins. Co. (C.C.A. 6), 67 F. (2d) 470, 472, reversed on other grounds; Helvering v. Independent Life Ins. Co., 292 U. S. 371, 54 S. Ct. 758, 78 L. Ed. 1311; Fordyce v. Helvering (C.C.A. 8), 78 F. (2d) 525, 528; Central R. Co. v. Commissioner (C.C.A. 3), 79 F. (2d) 697, 699, 101 A.L.R. 1448.
>
> The word 'derive' means 'to receive, as from a source or origin.' Webster's New International Dictionary (2d Ed.).
>
> *Hence gain or profit from property, though it comes into existence, does not become gross income until it is derived, that is received by the taxpayer.*

This is a common sense construction of the section. To allow a deduction on the basis of income never received and therefore no part of the gross income, on the net part of which a tax is exacted would be manifestly unfair. While oil extracted and sold to the Refining Company depleted the land, the depletion allowance is not granted to create a depletion reserve but to allow a deduction from gross income for tax pur-

poses and there should not be included in such gross income proceeds of oil never received by the taxpayer and no part of which became subject to income taxation." (Emphasis supplied.)

The Court there was dealing, among other things, with the identical section of the Revenue Act here under consideration. We can find nothing in its language which supports the Tax Court's views.

Another case cited on the same page of the opinion is *Helvering v. Mountain Producers Corporation,* 303 U. S. 376, 82 L. Ed. 907. The Supreme Court there said with respect to gross income basis for percentage depletion of oil wells (p. 382 U. S., p. 912 L. Ed.):

"* * * The term 'gross income from the property' means gross income from the oil and gas (Helvering v. Twin Bell Oil Syndicate, supra) and the term should be taken in its natural sense. With the motives which lead the taxpayer to be satisfied with the proceeds he receives we are not concerned. If, in this instance, the development operations had failed to produce oil, it would hardly be said that the expense of drilling, borne under contract by another, constituted 'gross income' of the taxpayer within the meaning of the statute. Nor, when oil or gas is produced, does the statute base the percentage on market value. The gross income from time to time may be more or less than market value according to the bearing of particular contracts. *We do not think that we are at liberty to construct a theoretical gross income by recourse to the expenses of production operations.* The Refining Company for

its own purposes undertook the expense of those operations, and Wyoming Associated was content to receive as its own return the cash payments for the oil produced, leaving to the Refining Company the risks of production.

We are of the opinion that the cash payments made by the Refining Company constituted the gross income of Wyoming Associated and was the basis for the computation of the depletion allowance." (Emphasis supplied.)

It will be seen that the foregoing language of this opinion of the Supreme Court does not support the respondent's construction of "gross income" by adding hypothetical profit to costs.

Other cases cited are equally distinguishable. In *Helvering v. Bankline Oil Company,* 303 U. S. 362, 82 L. Ed. 897, the Supreme Court held that processors of natural wet gas, who purchased the wet gas from the producers and paid for it on the basis of a percentage of its gasoline content, were not entitled to percentage depletion because they were not the owners of the oil or gas in place, and had no economic interest in the gas in place or any capital investment in the mineral deposit which suffered depletion.

In *Greensboro Gas Co. v. Commissioner of Internal Revenue,* 79 Fed. (2d) 701 (C.C.A. 3–1935), percentage depletion was denied on the retail price of natural gas sold to consumers based on income received by the producer after the gasoline had been transported from the wells through gas main service pipes and meters to the consumer. This is of

course no authority in the case at bar where the petitioners claim only for the wholesale value of the first marketable product at the mine.

A like ruling was made in *Consumers Natural Gas Co. v. Commissioner of Internal Revenue,* 78 Fed. (2d) 161 (C.C.A. 2–1935).

Another case heavily relied upon by the Tax Court (R. 103) and by the respondent in his brief below, was *Brea Cannon Oil Co. v. Commissioner of Internal Revenue,* 77 Fed. (2d) 67 (C.C.A. 9–1935). That case was similar to the *Bankline Oil* case above mentioned. The Court said (p. 68):

> "* * * The sole question for our consideration then is whether or not the amount *actually received from the sale* of casinghead gasoline by the petitioner is subject to the allowance of 27½ per cent. for depletion, or whether the depletion should be estimated upon the market value of the gasoline content of the wet gas." (Emphasis supplied.)

Sixty per cent of the proceeds of the sale of such product was retained by the processing company, to whom the wet gas was sold, as consideration for its services. Forty per cent was paid to the producer.

That is exactly what we are contending for in the instant case—the amount received for the quicksilver content of the ore produced at the mouth of the mine.

The Court further points out (p. 70) that the wet gas is composed of two marketable products, dry gas and casinghead gasoline, is salable as such, and has a market value, whereas the water content of the

oil produced by a well is an impurity like the oil sand which is also sometimes mixed with the oil. The Court said further (p. 70):

> "* * * it is immaterial for the purpose of this case whether or not the Commissioner is correct in ignoring the dehydrating process in estimating the depletable base where the oil produced contained a large water content, if he is correct in limiting the petitioners herein to the *market value* of the casinghead gasoline content of wet gas produced from the petitioner's property." (Emphasis supplied.)

It thus implies that if the Commissioner had not allowed the full value of the first marketable products, deduction of dehydrating costs would have been disapproved as a basis for obtaining gross income. All that was disallowed was the claim of the petitioner that there should be added to the gross income which it actually received from the sale of its product at the well the costs of manufacturing a more refined product, to wit, separated casinghead gasoline. This was disallowed and the petitioner was relegated to depletion on what he actually received. That is all petitioners ask for here.

As distinguished from these decisions in oil cases, we note that in the case of *Lumaghi Coal Co. v. Helvering,* 124 Fed. (2d) 645, 648 (C.C.A. 8–1942), the Court held that the expense incurred in operating silos and storage plants in connection with a coal mine was attributable to the business of mining and selling the coal, and was therefore a part of the "overhead and operation expense" incurred in carry-

ing on the mining business. The Court distinguished it from the oil cases above cited, where natural gas was transported many miles through piping to retail consumers, saying (p. 648):

> "* * * But a coal mine in operation implies as a usual and customary incident some kind of a plant for the extraction of the coal and making it accessible for transportation. The addition of the silos and storage to the mine tipple of the taxpayer effecting more continuous service and larger volume of output can scarcely be said to have changed the nature of the mining or to have split what was concededly one activity into two. We do not find error to justify reversal in the Board's conclusion that 'the petitioner was engaged in but one activity' in the tax year."

We also call the Court's attention to the provisions of Subdivision (f) (2) of Regulations 103 which provide that in the case of sulphur, the cost of pumping to vats, cooling, breaking, and loading at the mine for shipment is not to be deducted from gross income from the product. These operations were no less elaborate or more necessary in order to obtain a marketable product than those, the cost of which was deducted in the instant case.

We submit that there is nothing in the quoted decisions which supports the interpretation placed by the Tax Court on Regulations 103 and the statute to which they are germane. So far as expert evidence may be considered in aid of interpretation, we respectfully point out to the Court that in the opinion evidence given by State Mineralogist Walter W. Bradley (R. 67-73), witness Worthen Bradley (R.

75-77), and witness Henry W. Gould (R. 80-81), the process of obtaining a marketable product for quicksilver ore by roasting was held to be quite similar in *effect* to the obtaining of marketable products from gold, silver, copper, and lead ores by concentration and through gravity or flotation. The processes were physical processes in both cases, and obtained economically similar results.

This Court said in *Commissioner v. Kennedy Mining & Milling Co.,* 125 Fed. (2d) 399, 400 (C.C.A. 9–1942):

> "* * * The right to deduct for depletion of a mine a percentage of the gross or net income therefrom does not depend upon the type of mill used in treating the ores from which such income is derived."

The respondent produced no evidence contradicting these views. The Tax Court ignored them entirely in concluding that the furnacing, condensing, cleaning and flasking beneficiated the product in a greater degree than crushing and concentrating because, the Court said, if the ore had been concentrated, a process which would have given it no economic beneficiation, it would have still required furnacing. The Court overlooked the proper construction of the word "beneficiation" which we think in order to conform with the statutory intent should be related to the first *marketable* product from the operation rather than to the *physical* state of the metal content of the ore—that is, whether it is free or in the form of concentrates or amalgam. Its physical or chemical condition has little or nothing to do with the fact as to whether

it is capable of producing an income. That is a question of economics.

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(3) IF, AS PETITIONERS CONTEND, QUICKSILVER IN FLASKS, READY FOR MARKET, IS THE FIRST MARKETABLE PRODUCT AT THE MINE, IT NECESSARILY FOLLOWS THAT THE RESPONDENT'S DEDUCTION OF COSTS OF FURNACING, CONDENSING, CLEANING AND FLASKING FROM THEIR GROSS INCOME FROM SALES OF QUICKSILVER WAS IMPROPER, AND THE TAX COURT ERRED IN UPHOLDING IT. (SPECIFICATION NO. 6.)

There is no dispute in the record as to what were the costs of furnacing, condensing, cleaning, and flasking the metal in each case. In the stipulation of facts, New Idria case (R. 43, 45, 47), Klau Mine case (R. 55 and Exhibit B to the stipulation contained in the typewritten record on appeal), in the Oat Hill Mine case (R. 57 and Exhibit B to the stipulation contained in the typewritten record on appeal), and in the Wild Horse case (R. 62, and Exhibit B to the stipulation contained in the typewritten record on appeal), the exact figures for these deductions are all separately set forth. These deducted items of cost were all incurred by the petitioners themselves in producing the metal. Therefore, if the Circuit Court of Appeals should uphold the contentions of petitioners herein, the figures are available in the record on appeal to make a re-computation of the gross income basis for percentage depletion, and upon a remand of the case the Court could order such cancellation or recalculation of the tax liability as it might deem proper under the circumstances.

(4) TO AN EVEN GREATER DEGREE, THE TAX COURT ERRED IN UPHOLDING THE ARBITRARY APPORTIONMENT AND DEDUCTION OF PROFIT SO APPORTIONED TO EACH OF THESE EXCLUDED MINING OPERATIONS ADOPTED BY THE RESPONDENT COMMISSIONER IN ASSESSMENT OF PETITIONERS' TAXES. (SPECIFICATIONS NOS. 7, 8 and 9.)

The respondent was not satisfied with deduction of actual costs of operations essential to obtain a first marketable product from the petitioners' mines. He also proceeded to divide up the total profit from petitioners' mining operations so as to apportion to each separate operation the proportion of the total profit that he says the cost of that operation bore to the total cost of all operations. He then deducted from gross income the proportion of these calculated "profits" which he had allocated to each of the deducted items of furnacing, flasking, etc. The Tax Court approved this practice without comment.

The deduction of a hypothetical profit ascribable to each operation is illogical and inequitable. The profit in mining does not arise out of the cost of mining and beneficiation. These costs merely reduce the profit. Profit arises from two elements, (1) the existence of metal in the ground in a form which can be beneficiated at a reasonable cost; and (2) the existence of a market for the metal which will yield a profit to the owner of the ground, over and above the total cost of extracting the marketable product from its place in the earth. The cost of that extraction includes mining, milling, and in some cases, smelting or furnacing, but they are all steps in the production of a marketable product from the ore in place. There would be just as much logic in deducting

the cost of mining and a proportionate profit, on the theory that ore at the surface is more valuable than it is in the ground, as there is in deducting the cost of furnacing on the theory that metal which has been furnaced is more valuable than metal which is in the ore. The essential point is that it is *not marketable* until it has been mined, crushed, furnaced, condensed, and flasked. The profit is an over-all profit and is in no sense attributable to any elements of cost. The total cost may furnish a minimum point at which the owner can afford to market his product, but that is all. The market price is not determined by the cost of mining or beneficiating the ore. It is determined by the law of supply and demand, and it attaches to the product itself, not to the costs of producing it. The gross return from one property will be higher or lower than the gross return from another property, but particularly in the case of quicksilver it will not be due to the difference in the cost of beneficiation processes, which are practically uniform in character in this country. It will be due to the element of competitive market price, grade of ore, accessibility of property and relative costs of mining and raising it to the surface. In the case of gold and silver, the domestic prices of which are fixed by law, the profits have no basis whatever in costs of production for a different reason.

The lack of logic in the respondent's reasoning is further accentuated by showing that computing "gross income from the property" by adding to the cost of mining and crushing an apportioned profit, based on the proportion that the cost of mining and

crushing bears to the total costs and calling the sum "gross income" will invariably make the "gross income" from a low-cost property *less* than the gross income from a high-cost property containing ore of equal grade—an obvious absurdity which does violence to the basic reasons for allowing depletion at all. This may be illustrated by the following examples:

Two adjoining mining properties have absolutely the same mineral content per ton, but one is operated at the surface (using shovels and trucks) and the other underground, with resulting variations in costs:

Property No. One

had 10,000 tons of 3 lb. ore; cost of mining $1.50 per ton	$15,000.00	(3/5)
Furnacing	10,000.00	(2/5)
Sales at $2.00 per lb.	60,000.00	
Net profit	35,000.00	
Net profit per ton $3.50, of which (on respondent's theory) 3/5ths is added to mining cost, or $2.10, making total "gross income" per ton $1.50+$2.10=	3.60	
Depletion = 15% of this	0.54	

Property No. Two

had 10,000 tons of 3 lb. ore; cost of mining $4.00 per ton	$40,000.00	(4/5)
Furnacing	10,000.00	(1/5)
Sales at $2.00 per lb.	60,000.00	
Net Profit	10,000.00	
Net profit per ton $1.00, of which (on respondent's theory) 4/5ths is added to mining cost, or $0.80, making total "gross income" per ton $4.00+$0.80=	4.80	
Depletion = 15% of this	0.72	

Both ores at the furnacing point are identical, and therefore of equal value, but by the arbitrary method used, the ore which cost $1.50 per ton to mine yields less "gross income" than the ore which cost $4.00 per ton to mine. The result is contrary to any logical reasoning which of course would ascribe higher value and consequently higher depletion per ton to the low cost ore in place and lower value and consequently lower depletion per ton to the high-cost ore in place, and the same value to both ores at the mine mouth.

We must remember that the intent of the law is to use a percentage of the "gross income from the property" as the *measure* of depletion. If actual selling price is used in determining the gross income, the appropriate variation in depletion base based on the varying metal content per ton of ore is automatically provided for. However, if segregated costs are used as a basis for determining market value, the logical variation is lost, because the mining cost of one mine will have a different mining or furnacing cost ratio to selling price than another mine, and although the content per ton might be exactly the same and therefore equal in value, yet differences in costs could result in considerable differences in resulting gross income value arbitrarily arrived at by the proposal of the Bureau. All the authorities hold that percentage depletion is a statutory yardstick to measure the loss in value of a wasting capital asset. That yardstick should not be applied so as to give the anomalous result of high depletion on high cost ore and low depletion on low cost ore—a reversal of the principle of value in place just stated.

The Tax Court in its opinion does not even pass on the assignments of error which are raised in the petitions (R. 6) and made no finding whatever as to the propriety of this deduction of arbitrarily assigned profits other than to generally uphold the Commissioner's deduction. The respondent himself in his brief below did not defend his method of apportionment other than to say that petitioners had not offered anything else. Of course petitioners did not offer anything else, because they do not believe that any profit is attributable to these operations. As pointed out, there are no custom mills or smelters that handle quicksilver ores or concentrates, and no basis of comparison of profits from such operations. So far as the petitioners are concerned, they had only one profit, due, as we pointed out, to existence of metal in the ground and a market for that metal. All costs of operation from mining to flasking reduced the amount of profit that would be otherwise available. The operation costs of such processes and the depreciation on the equipment involved therein were deducted as operating expenses and there was never any contemplation that the selling price of the product would in any way be related to those expenses and depreciation charges. The market price of quicksilver was in no sense determined by them. It was entirely a question of supply and demand coupled with the effect of actual or potential foreign computation, and since the war, O.P.A. ceilings fixed on the basis of the selling price in 1941.

We submit that the attempted apportionment of profits was entirely illogical and improper. Further-

more, so far as the 1939 cases are concerned, the profit computation was brought about by Treasury Decision 4360, which never was enacted until 1940, and has been given retroactive effect upon petitioners' income for past years, contrary to the rulings in *Helvering v. R. J. Reynolds Tobacco Co.,* 306 U.S. 110, 116, 83 L. Ed. 536, 541, and *Hesslein v. Hoey,* 91 Fed. (2d) 954, 956 (C.C.A. 2-1937).

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(5) PETITIONER NEW IDRIA QUICKSILVER MINING COMPANY WAS ENTITLED TO CLAIM PERCENTAGE DEPLETION ON INCOME FROM ORE MINED AND EXTRACTED FROM DUMPS ON ITS LAND, WHICH DUMPS WERE ALWAYS AN INTEGRAL PART OF ITS PROPERTY, HAD NEVER BEEN SEVERED IN TITLE THEREFROM AND AS TO WHICH NO DEPLETION HAD EVER BEEN CLAIMED PREVIOUSLY. (SPECIFICATION NO. 10.)

The Tax Court relies heavily upon the decision in *Atlas Milling Co. v. Jones,* 115 Fed. (2d) 61 (C.C.A. 10-1940), and upon two Tax Court opinions reported at 43 B.T.A. 254 and 46 B.T.A. 241, respectively. The Tax Court distinguishes the situation in the New Idria case from that which governed the decision in *Kennedy Mining & Milling Co.,* 43 B.T.A. 617, 125 Fed. (2d) 399, upon the grounds that the petitioner in the instant case acquired the land with the dump ores thereon, which had been taken from the same property by predecessors in title, whereas the Kennedy Mining Company itself mined the ore from its property and also, at a much later date, the piled up tailings from that ore. Petitioner claims that the last mentioned circumstance is a distinction without legal significance.

The dumps in the New Idria case consisted of two classes,—one, ore that was mined from the land on which they were situated prior to 1913, and had been left there and covered with subsequently mined waste because, under the state of the milling art as it was then known, it was of too low a grade to beneficiate. The other dump consisted of partially beneficiated ore which by means of the improvements in the refining practices was capable of yielding still further metal. No depletion had ever been claimed by previous owners on either of the ore dumps, both of which had been left upon the identical property from which the ores were mined prior to the date of the first income tax law, and it had therefore passed from owner to owner as a part and parcel of the real estate until acquisition by petitioner in 1936. In other words, there never had been any severance of legal title to the ore in the dumps from that of the land on which they were situated. It follows necessarily that there never had been any separate economic existence provided for such ores. They were simply raw materials, taken from the property, some of them partly beneficiated, the reduction of which to a marketable product was completed by this petitioner. The question now arises as to whether the petitioner as an owner within the same chain of title under which both land and operating ore dumps has always passed is entitled to claim percentage depletion on that portion of the value of those ores which was not extracted by previous owners. We submit that the decision of this Court, and for that matter of the Tax Court itself, in *Commissioner of Internal Revenue v. Kennedy Mining & Milling Co.,* 125 Fed.

(2d) 399 (C.C.A. 9-1942) is clearly in point. In that case the Commissioner had contended that only so much of the taxpayer's income as was derived from newly mined ore was income from the mine. This Court held (p. 400):

> "(1) The Commissioner's contention must be rejected. The tailings from which the taxpayer derived part of its gross income and all of its net income during 1935 and 1936 were ores. They were ores from the taxpayer's mine, just as were the newly mined ores which the taxpayer treated in 1935 and 1936. Income derived from the ores called tailings, as well as that derived from the newly mined ores, was income from the mine.
>
> It is true, but not material, that the ores called tailings were mined prior to 1935. The mining of ores and the receipt of income therefrom are seldom, if ever, simultaneous. The two events are usually months apart and not infrequently years apart. Thus income from a mine during a taxable year may, and usually does, include income from ores mined prior to that year.
>
> Nor is it material that these ores (now called tailings) were, prior to 1935, subjected to treatment whereby part of their gold content was removed. The ores so treated remained after such treatment, as they were before, the property of the taxpayer and were thereafter, as theretofore, ores from the taxpayer's mine. Income derived from their subsequent treatment was income from the mine, just as was that derived from their first treatment."

Fully recognizing the force of the *Kennedy* decision, the Tax Court says, nevertheless, that the

situation in the *Kennedy* case is not the situation before this Court. It contends (R. 106):

> "* * * The income which petitioner received from processed dump ores was not income from the operation of its mine. The dump ores had been removed from the mine long before the petitioner acquired the property and were not a part of the mine at any time during petitioner's ownership."

With due respect to the Tax Court, we say that these ores were just as much a part of the mine during the taxable years under investigation as they were in the *Kennedy* case, and the petitioner's beneficiation of those ores was just as much a continuation of ore beneficiation as was allowed in the *Kennedy* case. Petitioner had succeeded to every single right that the former owners of the land had had by virtue of ownership of the land to beneficiate the ore in the dumps. What possible legal distinction can there be in these rights because the petitioner happened to be a successor in interest rather than the identical person, as was the situation in the *Kennedy* case? We can see none.

If the situation were one where the dumps had contained ore taken from other properties, and hence might be classed as raw material not extracted from the lands in question, if the title to the dumps had been severed from that to the land and the operator of the dumps was not the owner of the land, we could perceive the basis for a claim of distinction in the economic status of the ores; but neither of those

circumstances exist in the case at bar. It would be just as logical to deprive a present day owner of the right to percentage depletion because ores in place had been discovered by a predecessor and hence the added value which they had given to the mine was not given by the present owner. Even though severance of title to the ore from title to the land, or severance of the ore itself physically from location on the land from which it was taken might destroy the right to claim depletion, a mere transfer of ownership of both the land and the ore dumps on it, coupled with a history of continuous unity of title and possession, certainly does not justify depriving the mine owner of the right to a deduction for depletion of what has always been a part of the mineral value of the land.

We are mindful of the decision in *Atlas Milling Co. v. Jones,* 115 Fed. 2d) 61 (C.C.A. 10-1940), denying the percentage depletion allowance to the lessee of a tailings pile, and note the language of the Court in that case which, we submit, distinguishes the facts there from the case at bar (p. 64):

> "* * * We are not here concerned with whether the life tenant or remainderman is entitled to a depletion allowance, nor whether, if the St. Louis Smelting & Refining Company had retained its interest in the tailings and had recovered the mineral content in the taxable year 1933, it would have been entitled to a depletion allowance. The question presented is whether, after minerals have been severed, removed from a mine and treated, leaving a residue of tailings, *and a third person owning no economic interest in the mine from*

which the minerals were taken enters into a contract to process the tailings and to pay the life tenant a specified royalty out of the mineral values recovered for the right so to do, such third person, when he recovers mineral values from the tailings, suffers an exhaustion of a mine for which he may claim depletion." (Emphasis supplied.)

In the case of *Consolidated Chollar, Gould & Savage Mining Co. v. Commissioner of Internal Revenue,* 133 Fed. (2d) 440 (C.C.A. 9-1943), a situation quite similar to that in the *Atlas* case arose. This Court, after holding that ore material removed from a mine and dumped on ground not owned by the owner of the mine was not a natural deposit as to which the owner of the dump could claim depletion, made the same distinction for which we are here contending. Speaking through Judge Denman, the Court said (p. 441):

"Petitioner contends that the deduction is warranted by our decision in Commissioner v. Kennedy Mining and Milling Co., 9 Cir., 125 F. 2d 399. We do not agree. There we held the depletion deduction allowable because the recovery of mineral was from tailings of partially worked ore from a mine and mill owned by a taxpayer, deposited on taxpayer's land adjacent to the mine and mill from which they came, and hence the recovery was a mere continuation and completion of the processing of mineral extraction begun in the removal of the deposited material from the mine to the tailings dump. We distinguished that case from Atlas Milling Co. v. Jones, 10 Cir.,

115 F. 2d 61. There the deduction was disallowed. The taxpayer extracting the ore from the tailings did not own the mine from which the tailings had come, and the tailings were held not a mine or other natural deposit.

With reference to the classification of 'mines, * * * and * * * other natural deposits' we are unable to see any distinction, with regard to their natural character as a mine or deposit, between deposited tailings from partial working in a mill and from mines not owned by the owner of the depositing lands, and the deposited ore which had been no more processed than the crushing and fracturing also coming from mines not owned by the owner of the land on which the deposit is made."

In *South Utah Mines & Smelters v. Beaver County,* 262 U.S. 325, 67 L. Ed. 1004, the Supreme Court passed on the right of the State of Utah to value as a metalliferous mine tailings separated and removed from the mining claims and placed on other lands, stating (p. 332):

"* * * The tailings, severed and removed from the mining claims, changed in character, *placed on other and separate lands,* and having an ascertained and adjudicated value of their own, in our opinion, constituted a unit of property entirely apart from the mine from which they had been taken." (Emphasis supplied.)

The Tax Court itself admits in its opinion (R. 105) the distinction which we have made in the *Atlas* case and *Consolidated Chollar* case, but declines to rec-

ognize that the identity of the ores in the New Idria dumps in title, in possession and in history with the land from which they came entitle them to be considered as partially mined and processed ores, on the residual valuation of which depletion may be claimed. This ruling we assign as error in view of the decision of this Court in the *Kennedy* case, *supra*.

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(6) PETITIONER OAT HILL MINE, INC. WAS ENTITLED TO DEDUCT FROM ITS TAX RETURN THE PAYMENT MADE TO THE PACIFIC GAS AND ELECTRIC COMPANY FOR POWER SERVICE. (SPECIFICATION NO. 11.)

The last contention is made on the principle that the law and the tax regulations entitle the corporate taxpayer to deduct from its gross income expenditures reasonably and necessarily incurred in operating its property which do not represent the acquisition of any capital item. The expenditure in question was nothing more nor less than an advance payment to a power company for service. The power company would not go to the expense of installing a transmission line leading to petitioner's property unless it were assured of a certain amount of income. The opinion of the owner's manager, as expressed in the evidence (R. 83-84), was that Oat Hill Mine, Inc. had prospectively about a three year operation. Since then it appears that the petitioner corporation has been disincorporated. The witness, Henry W. Gould, was its president and general manager, competent to make such an estimate. The respondent offered no

testimony whatever to rebut that opinion evidence. We think the equitable thing for respondent to have done would have been to allow this item of operating expense as a deduction prorated over the probable life of the operation, instead of disallowing it entirely. We are not advised as to whether the Government recovered an income tax payment from the Pacific Gas and Electric Company for the amount of this deposit or not, but if it did not it was not the fault of petitioner here. Oat Hill Mine, Inc. was out of pocket for that expense, received no capital item but only current electric service for it, and by reason of the short life of its operation will not be entitled to a refund against future power bills under the terms of its contract. We submit that disallowance of this deduction was erroneous.

CONCLUSION.

Fully appreciating that the question of allowance for percentage depletion is at best a technical one, that the right to depletion, as the Courts have frequently said, is "a grace" permitted by Congress and not an inherent right; fully appreciating that Section 114 (b) (4) of the Revenue Code is intended to be a statutory measure of the right of the taxpayer granted under Section 23(m) to recoup and deduct from gross income for a wasting capital asset; we assert with confidence that the respondent has strayed far from the intent of the statute in his treatment of these petitioners' returns. He has attempted to treat

as gross income crude ore in an unmarketable state. He has built up a hypothetical income by arbitrary additions of assumed profits to the actual cost of mining and crushing this ore. He has refused to allow depletion at all of the wasting values of the ore formerly mined from the identical land in question and in the course of being re-processed from the dumps. He has departed entirely from the statutory concept of a tax on income and by disallowing deduction of proper depletion allowance he is in effect taxing the capital of the petitioners as a part of their income. This has not been the intent of Congress in passing the income tax law, nor was it the intent of the Sixteenth Amendment to the Constitution under which that income tax law became permissible. The Tax Court has apparently followed the respondent in these misinterpretations of the statutory intent of Congress. We submit that its decision should be reviewed and reversed in all the particulars in which we have shown it to be erroneous.

Dated, San Francisco, California,
December 22, 1943.

ROBERT M. SEARLS,
Attorney for Petitioners.

(Appendix Follows.)

Appendix.

Appendix

FEDERAL STATUTES AND REGULATIONS REFERRED TO IN BRIEF.

Internal Revenue Code,

Section 23 (m). General provision for depletion of all natural deposits:

(m) *Depletion.* In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the

trust, or, in the absence of such provisions, on the basis of the trust income allocable to each."

(n) *Basis for depreciation and depletion.* The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

Internal Revenue Code,

Section 114 (b) (4) contains the statutory measure of depletion of quicksilver mines and sulphur:

Section 114. Basis for depreciation and depletion.

(a) *Basis for depreciation.* The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

(b) *Basis for depletion.*

* * * * * * *

(4) *Percentage depletion for coal and metal mines and sulphur.* The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the prop-

erty. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property.

Treasury Regulations 103, interpreting Section 114 (b) (4) read as follows:

Sec. 19.23 (m)–1. Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.—

* * * * * * *

When used in these sections (19.23 (m)–1 to 19.23 (m)–28, inclusive) covering depletion and depreciation—

(f) "Gross income from the property", as used in section 114(b)(3) and (4) and sections 19.23(m)–1 to 19.23(m)–28, inclusive, means the amount for which the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine or well, but, if the product is transported or processed (other than by the processes excepted below) before sale, it means the representative market or field price (as of the date of sale) of crude mineral product of like kind and grade before such transportation or processing. If there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude state is merely

transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation and the processes not listed below. The processes excepted are as follows:

(1) In the case of coal—cleaning, breaking, sizing, and loading at the mine for shipment;

(2) In the case of sulphur—pumping to vats, cooling, breaking, and loading at the mine for shipment;

(3) In the case of iron ore and ores which are customarily sold in the form of the crude mineral product—sorting or concentrating to bring to shipping grade, and loading at the mine for shipment; and

(4) In the case of lead, zinc, copper, gold, or silver ores and ores which are not customarily sold in the form of the crude mineral product—crushing, concentrating (by gravity or flotation), and other processes to the extent to which they do not beneficiate the product in greater degree (in relation to the crude mineral product on the one hand and the refined product on the other) than crushing and concentrating (by gravity or flotation).

In case any of the excepted processes are not applied in the immediate vicinity of the mining district in which the mine is located, costs incurred for transportation to the processing location and, if transported by taxpayer, the proportionate profits attributable to transportation should be subtracted from the sale price of the product to determine "gross income from the property".

In the case of oil and gas, if the crude mineral product is not sold on the property but is manufactured or converted into a refined product or is transported from the property prior to the sale, then the "gross income from the property" shall be assumed to be equivalent to the market or field price of the oil or gas before conversion * * *.

(g) "Net income of the taxpayer (computed without allowance for depletion) from the property" as used in section 114 (b) (2), (3), and (4) and sections 19.23(m)-1 to 19.23(m)-28, inclusive, means the "gross income from the property" as defined in paragraph (f) of this section less the allowable deductions attributable to the mineral property upon which the depletion is claimed and the allowable deductions attributable to the processes listed in paragraph (f) in so far as they relate to the product of such property, including overhead and operating expenses, development costs properly charged to expense, depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion. Deductions not directly attributable to particular properties or processes shall be fairly allocated. To illustrate: In cases where the taxpayer engages in activities in addition to mineral extraction and to the processes listed in paragraph (f), deductions for depreciation, taxes, general expenses, and overhead, which cannot be directly attributed to any specific activity, shall be fairly apportioned between (1) the mineral extraction and the processes listed in paragraph (f) and (2) the additional activities, taking into account the ratio which

the operating expenses directly attributable to the mineral extraction and the processes listed in paragraph (f) bear to the operating expenses directly attributable to the additional activities. If more than one mineral property is involved, the deductions apportioned to the mineral extraction and the processes listed in paragraph (f) shall, in turn, be fairly apportioned to the several properties, taking into account their relative production.

(h) "Crude mineral product", as used in paragraph (f) of this section, means the product in the form in which it emerges from the mine or well.

Nos. 10589, 10590, 10591, 10592

In the United States Circuit Court of Appeals for the Ninth Circuit

NEW IDRIA QUICKSILVER MINING COMPANY, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

KLAU MINE, INC., A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

OAT HILL MINE, INC., A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

WILD HORSE QUICKSILVER MINING CO., A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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JURISDICTION

Each of these four appeals involves federal income taxes. On June 30, 1942, the Commissioner of Internal Revenue mailed to the New Idria Quicksilver Mining Company a notice of deficiency for the tax years 1939, 1940 and 1941. Within ninety days thereafter and on September 8, 1942, New Idria Quicksilver Mining Company filed its petition for review with the Board of Tax Appeals (now the Tax Court of the United States) for a review of that determination under the provisions of Section 272 of the Internal Revenue Code. (R. 3–22.) The printed record before this Court does not show the date of the mailing of the notice of deficiency or the date when the petition was filed with the Board in any of the other three cases, but in each of those cases the respective dates were the same as the corresponding date in the New Idria Quicksilver Mining Company case. The case of each of the other three taxpayers, however, involved only that taxpayer's taxable year 1940. The Tax Court entered a separate final order in each case on August 13, 1943. (R. 110–113.) The cases are brought to this Court by separate petitions for review, each filed October 12, 1943, pursuant to the provisions of Sections 1141–1142 of the Internal Revenue Code. (R. 114–119.) By order of this Court dated November 5, 1943, entered upon stipulation of the parties, the several cases were consolidated in this Court for purposes of review. (R. 126–130.)

QUESTIONS PRESENTED

1. Whether in the case of quicksilver mines percentage depletion is computed on the market value of the cinnabar ore as it emerges from the mine or on the gross sales of the liquid mercury which the mining company processes from the mined ore.

2. Whether any depletion deductions are allowable to the New Idria Quicksilver Mining Company in respect to the cinnabar ores or in respect to the mercury the New Idria company extracted from cinnabar ores deposited and dumped upon its land by the previous owners of that land.

3. Whether the Oat Hill Mine, Inc., may take a deduction from income for the $3,750 it paid to an electric company during the tax year 1940 for an extension of a power line to the Oat Hill mine.

STATUTES AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*.

STATEMENT

Many of the facts were stipulated before the Tax Court (R. 28–54, 55–56, 56–60, 61–62) and the stipulated facts were then supplemented by the testimony of three witnesses for the several taxpayers (R. 64–87). One issue is common to all four cases; another issue is involved only in the case of the New Idria Quicksilver Mining Company, a Nevada corporation organized July 3, 1936 (R. 28); and a further issue is peculiar to the Oat Hill Mine, Ins., case. All four taxpayers were corporations, but two of them, Oat Hill Mine, Inc., and Wild Horse Quicksilver Mining

Company, were dissolved in December, 1941, that is, approximately a year or more after their tax year here involved. Upon dissolution the directors of the two dissolved corporations became trustees for the corporate creditors and stockholders. All the taxpayers, save Oat Hill Mine, Inc., owned the mines which they operated; Oat Hill operated under a sublease. All four corporations made their income and declared value excess profits tax returns upon the accrual basis. (R. 91–92, 96.)

The further facts as found by the Board were as follows:[1]

Quicksilver, or mercury, is obtained from ore containing cinnabar, a chemical compound of mercuric sulphide. In order to secure most efficient production the cinnabar ore is crushed and roasted in ovens and the mercury is released in the form of a vapor. The vaporized mercury is then condensed and worked with lime to remove soot and other impurities. After this cleaning operation the mercury is placed in metal containers or "flasks" and sold on the market. (R. 92.)

New Idria's principal source of mercury during the taxable years was crude cinnabar ore extracted from subterranean workings in its mine. These workings were developed by "drifts" and "crosscuts." The ores were blasted and sorted in the mine and those containing sufficient cinnabar were hauled in cars to the

[1] The witnesses with respect to depletion all testified specifically as to the situation of the New Idria Company after a stipulation of counsel (R. 63–64) that the record made on the one issue in the New Idria case would be considered a part of the record in each of the three other cases.

surface where they were crushed and carried by conveyors to the furnaces. (R. 92.)

New Idria operates two furnaces at its mine. They are of the rotary type, five feet in diameter and fifty-six feet in length. They are made of iron and lined with fire brick. The crushed ores are fed into the furnaces and heated to a temperature of about 1,200° Fahrenheit. The mercury vapors as they are released by the heat are drawn from the furnace by suction fans and passed into a condenser system, which consists of two vertical banks of ten pieces of sixteen-inch iron pipe each, with rubber buckets at the bottom of the pipes to collect the condensed mercury. These buckets are emptied on tables where the contents are mixed with slack lime and worked with hoes to cleanse or free the mercury. After this operation the mercury is practically pure and is ready for market. (R. 92–93.)

This method of extracting mercury is similar in many respects to the method used in extracting gold by the "amalgamation" process. By that process concentrated gold ore is treated with mercury, causing a fusion or amalgamation of the gold and mercury, which are said to have a natural affinity for each other, and the mercury is then separated from the gold by distillation. (R. 93.)

Experiments have been made from time to time in prior years, by New Idria and others, with different methods, such as the "gravity" and "flotation" methods, for concentrating the cinnabar ore before furnacing and condensing it. These experiments have

all proved uneconomical. The cost of concentration alone was found to be approximately as great as or greater than the cost of roasting the crude ore in the rotary furnaces, and the concentrated ore still had to be heated in retorts. At the present time the method employed by New Idria, as described above, is that generally used in the production of mercury, commercially, in the United States. (R. 93–94.)

The Tax Court also found that after concentrating cinnabar ore by either the uneconomical gravity or the uneconomical flotation methods the additional processes of furnacing, condensing, cleaning and flasking were still necessary. (R. 100.) As an ultimate finding upon the first issue, the Tax Court found that the processes—which the taxpayers effected—of furnacing the crushed cinnabar ore [2] and condensing, cleaning and flasking the ultimate product, liquid mercury, all "beneficiated the product in a greater degree than 'crushing' and 'concentrating' " the cinnabar by the gravity or the flotation method. (R. 100–101.)[3]

Located on New Idria's properties are large deposits of ores which in years past have been mined and discarded by former operators. Some of these ores have been furnaced by former operators and some

[2] In order to "furnace" the cinnabar ore it was crushed at the mine to a size of not more than two inches. (R. 100.)

[3] Cf. R. 81, where the vice president and general manager of New Idria testified that where flotation or gravity concentration has occurred the ultimate recovery (after all processing) may be 60 to 80 per cent, whereas by quicksilver roasting, condensing and cleaning New Idria recovers about 98½ or 99 per cent.

discarded before furnacing because of their low content of cinnabar ore. Mine operations have been conducted on the property continually since about 1858. The discarded and the burnt ores, which are referred to in the stipulation as "dump" ores, contain a small amount of cinnabar from which mercury can be profitably recovered under modern improved methods of operation. New Idria processed considerable quantities of these dump ores during the taxable years, in addition to the crude ore which it extracted from its mine. They were loaded on trucks with steam shovels and hauled to the furnaces where they were processed in the same manner as the crude ore from the mines. The dump ore deposits are located about a mile and a half from New Idria's plant. (R. 94.)

New Idria's gross sales of mercury obtained from the mined ores and from dump ores during each of the taxable years and its net sales, after deductions of all costs of production but without any deduction for depletion, were as follows (R. 95):

Year	Mined ores		Dump ores	
	Gross sales	Net sales	Gross sales	Net sales
1939	$265,174.54	$19,423.27	$57,844.18	[1] $683.06
1940	517,113.14	160,982.65	80,700.36	30,993.42
1941	791,227.75	201,995.76	110,489.70	40,313.66

[1] Loss.

Crude cinnabar ore was not bought or sold in the vicinity of the mines of any of the taxpayers during any of the taxable years and there has never been any established market for it. (R. 95.)

New Idria elected to claim depletion deductions in its income and declared value excess profits tax returns for the taxable years 1939, 1940, and 1941 on a percentage basis, computed on its total gross sales of mercury from all sources. The Commissioner determined in his deficiency notice that New Idria's percentage depletion deductions should be computed on the basis of the selling price, or market value, of the cinnabar ore at the mouth of the mine and not on the selling price of the mercury in flasks. He arrived at that basis by excluding from gross sales, on which the depletion deductions were computed, all of the costs of transporting, furnacing, condensing, cleaning, and flasking, as shown by New Idria's books.[4] The resulting reduction of the depletion allowances claimed in New Idria's returns for each of the taxable years was as follows (R. 95):

Year ended	Claimed in returns	Allowed in deficiency notice
June 30, 1939	$9,009.03	$7,663.81
June 30, 1940	89,672.03	71,202.36
June 30, 1941	122,176.80	94,924.71

The Commissioner filed an amended answer (R. 23–28) in the New Idria case in which he alleged that all of the depletion allowances claimed by New Idria in respect of the "dump" ores should be disallowed and that the deficiencies as determined in the deficiency notice should be increased accordingly. As so in-

[4] The Commissioner used the same method in determining the depletion deductions of each of the other taxpayers.

creased the deficiencies amount to $226.05 for 1939, $5,133.10 for 1940, and $9,879.94 for 1941. (R. 96.)

It was stipulated that the deposits of dump ores on New Idria's properties and all rights in them have been at all times an unsevered part of the realty on which New Idria's mine is located and that the portions of such deposits processed by New Idria during the taxable years were placed thereon prior to March 1, 1913, and so have never been subjected to any depletion allowances in any returns filed by New Idria or prior owners of the property. (R. 96, cf. R. 32–34).

In determining the deficiency against Oat Hill Mine, Inc., the Commissioner disallowed the deduction of an item of $3,750 which that company paid in 1940 to the Pacific Gas & Electric Company for the extension of an electric line and the installation of transformers necessary to furnish electric current to its mine. (R. 96–97.) The payment was made under a contract (R. 58–60) which provided that all of the equipment so used should remain the property of the electric company and that (R. 97):

> If and whenever Applicant shall have operated the electrical apparatus originally installed by him or its equivalent, served from the equipment installed hereunder, for a period of thirty-six (36) consecutive months, and the Applicant's business shall at that time have proved its permanency to the entire satisfaction of the Company, and upon the execution of the proper agreements and the compliance by Applicant with all the conditions necessary to obtain permanent service pursuant to the Company's standard practice relative to the construction

> of electric line extensions in force at the end of said thirty-six months period, the Company *shall repay* to Applicant said contract price except such portion thereof as may be required as a line extension deposit under the Company's standard practice relative thereto, and said deposit shall thereafter be refunded in accordance therewith. [Italics ours.]

The Tax Court held: (1) That taxpayers were not entitled to take percentage depletion upon the gross sales which they made of liquid mercury, the product of processing their cinnabar ore, but only upon the unprocessed value of the cinnabar ore as it emerged crushed and sorted from the mines (R. 104); (2) that no depletion deductions were allowable to the New Idria Quicksilver Mining Company in respect to the cinnabar ore, or the mercury it processed from cinnabar ore, which had been mined by New Idria's predecessors in title and deposited and dumped upon the mining property (R. 106); and (3) that Oat Hill Mine, Inc., was not entitled to deduct from its year 1940 income either all or one-third of the $3,750 it paid that year to Pacific Gas & Electric Company, or deposited with that company, to secure the extension of a power line to the Oat Hill mine (R. 109).

SUMMARY OF ARGUMENT

Percentage depletion, whether in the case of oil and gas wells or in the case of mineral mines, is allowed upon a taxpayer's "gross income from the property" during the tax year, and has been so allowed since the statutory provision for percentage depletion was written into the law. Percentage de-

pletion was allowed in the interest of convenience, but, as with cost or discovery depletion, its fundamental purpose was always that of a compensatory allowance to owners of an economic interest in oil, gas or minerals in place on account of the severance *of their natural resources.* The term "gross income from the property" can only mean the sale price realized for *the crude mineral product,* for only a crude mineral resource is depleted when ore (or crude oil) is brought to the earth's surface.

If extracted ores cannot be sold in their crude state, when brought out of the mine, but must be treated and processed, as is necessary with cinnabar ore in order to produce commercially marketable liquid mercury, the further processes necessary to refine and treat the ore are not mining operations and do not deplete the ore deposit. Such processes are essentially manufacturing processes. Moreover, the profit at which the mine operator-processor sells his ultimate product is *an over-all profit,* the result of the sum of his mining, further processing, refining and manufacturing operations, including in some instances transportation.

As the statutory depletion allowance in the case of mineral mines is 15 per cent of "gross income from the property" being depleted, i. e., of gross income from *the crude ore,* this excludes a deduction of gross income *from other sources.* Thus gross income from refining, manufacturing and non-mining operations is not subject to a depletion allowance.

The Treasury Regulations carry out the statutory purpose, for they plainly state that mine operator-

processors may not claim a depletion deduction upon either their gross income from non-excepted processing, refining or manufacturing of extracted minerals or upon their net profits from such sources. Such Regulations are valid; the several taxpayers, who manufactured marketable liquid mercury from their crude cinnabar ore, come within them; and the Tax Court properly held that the depletion deduction of each taxpayer must be determined in accordance with the rule elaborated in the Regulations.

The dump material which the New Idria Quicksilver Mining Company alone processed to get liquid mercury was not a part of any mine when New Idria bought it or thereafter. New Idria's entire activities with respect to such dump material seem to be that of a mere processor, who, of course, has no depletable interest and is not entitled to a deduction for depletion. In any event, in furnacing, refining and otherwise treating the dump material to get liquid mercury from it New Idria was manufacturing, not mining, and its gross income from such operations was not subject to a deduction for depletion.

The sum which Oat Hill Mine, Inc., paid an electric company for an extension of a power line was not an expense, either in part or in whole, of Oat Hill's tax year 1940. The $3,750 was refundable under certain conditions and presumably has been refunded ere this. However, if never refunded it was a capital investment to induce service for "an indefinite period" and thus no part of the payment may be taken as a deduction in the year 1940.

ARGUMENT

I

The Tax Court properly held that the percentage depletion allowable in respect to quicksilver mines is computed on the value of the ore as it emerges from the mine

Although all Revenue Acts, beginning at least with that of 1916, allowed the deduction of "a reasonable allowance" for the depletion of mines and of other specified wasting natural resources, under rules and regulations to be prescribed by the Treasury Department,[5] the first Revenue Act to authorize the deduction of "percentage depletion", so-called, in the case of metal, coal and sulphur mines was the Revenue Act of 1932, c. 209, 47 Stat. 169, Section 114 (b) (4) thereof. Percentage depletion had first been allowed in the case of oil and gas wells by the Revenue Act of 1926, c. 27, 44 Stat. 9, Section 204 (c) (2). See, also, Section 114 (b) (3), Revenue Act of 1928, c. 852, 45 Stat. 791. The provision in the 1932 Revenue Act, Section 114 (b) (4), represented an extension by Congress of that with which it was already familiar, i. e., percentage depletion, for oil and gas wells, to the further field of metal mines. As the report of the Senate Committee on Finance put it (S. Rep. No. 665,

[5] See Section 5, Eighth, Revenue Act of 1916, c. 463, 39 Stat. 756; Sections 214 (a) (10) and 234 (a) (9), Revenue Acts of 1918, c. 18, 40 Stat. 1057, and 1921, c. 136, 42 Stat. 227; Sections 214 (a) (9) and 234 (a) (8), Revenue Acts of 1924, c. 234, 43 Stat. 253, and 1926, c. 27, 44 Stat. 9; Section 23 (l), Revenue Act of 1928, c. 852, 45 Stat. 791; and 23 (m) of succeeding Revenue Acts, including the Internal Revenue Code. Cf. Section II, B and G (b), Income Tax Act of 1913, c. 16, 38 Stat. 114, 166.

72d Cong., 1st Sess., p. 16 (1939–1 Cum. Bull. (Part 2) 496, 508)):[6] "* * * percentage depletion has been extended to metal mines as well as to sulphur and oil and gas wells."

The statutory basis for percentage depletion in the case of oil and gas wells was from the first "the gross income from the property" during the taxable year. Section 204 (c) (2), Revenue Act of 1926; Section 114 (b) (3), Revenue Act of 1928. And so it has remained under all subsequent Acts, viz, Section 114 (b) (3), Internal Revenue Code. But the statutory term "gross income from the property" needed interpretation and the Treasury Regulations undertook this interpretation and the necessary implementation of the statutory provisions. Articles 221 and 1602, Treasury Regulations 69, promulgated under the Revenue Act of 1926, throw little light upon the subject, but Article 201, dealing with depletion of mines as well as of oil and gas wells, concluded by saying that if the raw mineral product were manufactured or converted into a refined product "then the gross income shall be assumed to be equivalent to the market or field price of the raw material before conversion." Article 221, Treasury Regulations 74, promulgated under the Revenue Act of 1928, was slightly more detailed and read in pertinent part:

> If the oil and gas are not sold on the property but *are manufactured or converted into a refined product* or are transported from the prop-

[6] See, also, the same report, p. 30 (1939–1 Cum. Bull. (Part 2) 518), and the conference report, H. Conference Rep. No. 1492, 72d Cong., 1st Sess., p. 14 (1939–1 Cum. Bull. Part 2) 539, 542).

> erty prior to sale, then the gross income [from the property] shall be assumed to be equivalent to the market or field price of the oil and gas *before conversion* or transportation." [Italic ours.]

This regulation, of course, was a proper implementation of the statute, and its validity is not now open to doubt. *Brea Cannon Oil Co.* v. *Commissioner,* 77 F. 2d 67 (C. C. A. 9th), certiorari denied, 296 U. S. 604; *Consumers Natural Gas Co.* v. *Commissioner,* 78 F. 2d 161 (C. C. A. 2d), certiorari denied, 296 U. S. 634; *Greensboro Gas Co.* v. *Commissioner,* 79 F. 2d 701 (C. C. A. 3d), certiorari denied, 296 U. S. 639.

Thus in *Brea Cannon Oil Co.* v. *Commissioner, supra,* the case of a taxpayer who processed its own wet gas at its wells to extract dry gas and casing-head gasoline, this Court said (p. 69) that the provision for percentage depletion in the Revenue Acts of 1926 and 1928 "is intended to represent the amount of capital recovered in the product produced by the well, that is *the value of the raw product.*" [Italics ours.] And, somewhat similarly, in *Consumers Natural Gas Co.* v. *Commissioner, supra,* where the precise problem was to determine the "gross income from" oil and gas wells which under the Revenue Acts of 1926 and 1928 was subject to percentage depletion, the court said (pp. 161–162).

> * * * we are not justified in injecting into the "basis" ["the gross income from the property"] the added value imparted to the output by work done upon it after it reaches the surface.

See also, *United States* v. *Ludey,* 274 U. S. 295, 302,

When Congress, by the Revenue Act of 1932, "extended" percentage depletion to metal mines it did so in the light of the legislative and administrative experience with percentage depletion in the case of oil and gas wells. The rate of percentage depletion for oil and gas wells was 27½ per cent "of the gross income from the property" during the taxable year;[7] the rate for metal mines was "15 per centum * * * of the gross income from the property during the taxable year." Section 114 (b) (4), Revenue Acts of 1932, 1934, c. 277, 48 Stat. 680, 1936, c. 690, 49 Stat. 1648, 1938, c. 289, 52 Stat. 447, and the International Revenue Code (Appendix, *infra*). Treasury Regulations were forthwith promulgated to implement the new statutory provisions, and they, as might be expected, followed the pattern established by Regulations 69 and 74 for determining "gross income from the property" in the case of oil and gas wells. Ore mining, no less than the production of crude oil from oil wells or wet gas from gas wells, yields a raw product at the earth's surface. This must be processed and refined, quite often by very elaborate methods, to secure *an ultimate product* usable in industry. These processes, like the "cracking" and other methods employed in the distillation of gasoline or the methods used in the separation of wet gas into dry gas and casinghead gasoline, the Treasury Department and its experts, including engineers, believed were essentially manufacturing and not mining operations and processes. The Treasury Department, bearing in mind that the purpose of the

[7] Section 204 (c) (2), Revenue Act of 1926; Section 114 (b) (3), Revenue Act of 1928.

statutory allowances for depletion, both with respect to mineral mines and with respect to oil and gas wells, is to allow a tax-free return of capital invested in minerals in place, i. e., of "the value of the raw product" (*Brea Cannon Oil Co.* v. *Commissioner, supra,* p. 69),[8] promulgated its Regulations accordingly.

From the first these Regulations said plainly that "gross income from the property", as used in Section 114 (b) (3) *and* (4) of the statute and in the implementing articles of the Treasury Regulations, *meant* the selling price of *"the crude mineral product"* of the mineral property or, *if* the crude product were not sold as such but was processed, the field price *"before the application of any processes* (to which the crude mineral product may have been subjected after emerging from the mine or well)" with the exception of certain processes specifically listed. Article 22 (*g*), Treasury Regulations 77, promulgated under the Revenue Act of 1932 (Italics ours). The same excepted processes were allowed if there was no representative field price for the taxpayer's crude mineral product, so that the taxpayer had to process or refine his raw product to obtain a marketable product. When such was the situation a fair market or field price *for the crude mineral product* was to be calculated.

This was not difficult. The field price of the first marketable product after processing was taken as the base and from that deductions were directed to get the value of the raw mineral product before processing (and hence the amount of the ultimate gross income

[8] Cf. *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364; *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 366–368; *Consumers Natural Gas Co.* v. *Commissioner supra*, pp. 161–162.

received for the minerals). From the first the Regulations [9] directed the deduction, from the basis, of all processing costs after mining (including transportation) save that as a rather generous concession to mine owners certain processing costs were excepted by the Regulations. The cost of the excepted processes need not be deducted in a mine owner's calculations to determine his "gross income from property", i.e., his gross income from the raw mineral product, for depletion purposes. Then the Treasury Department realized that the entire net profit which a mine operator-processor realized from selling refined or manufactured products was not necessarily a result of just the mining operations, but was the result of *the sum of* the mining and the further processing, refining and manufacturing operations.

Article 23 (m)–1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, was amended accordingly by T. D. 4960, 1940–1 Cum. Bull. 38, 39, promulgated January 3, 1940, to exclude from the determined "gross income from" the raw mineral product the proportionate profits attributable to the refining and manufacturing operations, and Section 19.23 (m)–1 of the Regulations under the Internal Revenue Code, Treasury Regulations 103, promulgated January 29, 1940, contains the same provision.

[9] Article 221, Treasury Regulations 77; also, Article 23 (m)–1, Treasury Regulations 86, promulgated under the Revenue Act of 1934, Treasury Regulations 94, promulgated under the Revenue Act of 1936, Treasury Regulations 101, promulgated under the Revenue Act of 1938, and Section 19.23 (m)–1, Treasury Regulations 103, promulgated under the Internal Revenue Code (Appendix, *infra*).

Otherwise those Regulations are precisely the same as the three immediately preceding Regulations. Thus to calculate a fair field price for the raw mineral product, where it could not be sold in its crude state, the mine owner-processor must—under Treasury Regulations 101, as amended, and Treasury Regulations 103—deduct from the field price of the first marketable product after processing "the costs *and proportionate profits* attributable to the transportation and the processes not listed below." [10] [Italics ours.] The processes, the cost of which need not be thus deducted, are as follows: [11]

> (4) In the case of lead, zinc, copper, gold, or silver ores and ores which are not customarily sold in the form of the crude mineral product—crushing, concentrating (by gravity or flotation), and other processes to the extent to which they do not beneficiate the product in greater degree (in relation to the crude mineral product on the one hand and the refined product on the other) than crushing and concentrating (by gravity or flotation).

The Tax Court has approved the determination of the "gross income [of each of the several taxpayers] from" its raw mineral product, i. e., its cinnabar ore, in accordance with these Regulations. Only the New Idria Quicksilver Mining Company is substantially concerned with the effect of the Commissioner's

[10] This phrase of Treasury Regulations 101 before its amendment read: "* * * the cost (including transportation costs) of the processes not listed below."

[11] Subparagraph (g) (4) is precisely the same under all the Treasury Regulations, 77, 86, 94, 101 and 103.

amendment to Treasury Regulations 101 by T. D. 4960, January 3, 1940, and that company only so far as that amendment affects its taxable year 1939; the case of each of the other taxpayers involves only its tax year 1940, as to which no claim can be made that the amended regulation is retroactive. We shall, therefore, seek first to dispose of the argument of the several taxpayers that the entire sales price of their refined mercury represented their "gross income from" the raw cinnabar which they mined, and then disposed of New Idria's incidental argument that the Commissioner's amendment of Article 23 (m)–1, Treasury Regulation 101, by T. D. 4960, on January 3, 1940, was retroactive, so far as concerns New Idria's tax year 1939, and invalid.

(a) In the face of the legislative history detailed above we think it impossible for anyone to maintain that, by the "extension" of percentage depletion to metal mines, Congress intended to authorize depletion upon the enhanced sale price of an ultimate product which is the result of applying—to the raw mineral product brought out of the mine—non-excepted processes, whether refining, manufacturing, or otherwise. The fundamental purpose of a depletion deduction was a compensatory allowance to owners, on account of severance of their natural resource when consumed in the production of income, and this is just as true where the statute allows a deduction based on "gross income from the property" as where the depletion is based on cost or on discovery value. *Helvering* v. *Bankline Oil Co., supra,* pp. 366–367; *Anderson* v. *Helvering,* 310 U. S. 404, 407–408; *Brea Cannon Oil*

Co. v. *Commissioner, supra.* Cf. *United States* v. *Ludey, supra.*

Ordinarily a market price exists for the raw mineral product as it is produced. Where this is so the "gross income from the property" is the sale price of *the crude mineral* product in the immediate vicinity of the mine or well. One subject of the Regulations is the determination of an equivalent of such fair market price for the raw product in instances where elaborate processing of the crude mineral is necessary to get a marketable product.

The price which a mine operator-refiner or manufacturer eventually received for an ultimate product (after the application of elaborate non-excepted processes to the crude mineral) is obviously a price not for his crude mineral as such but *for a crude mineral plus,* in short, for the mineral *as refined and beneficiated* by the further processes. The intermediate processes are plainly manufacturing (and not mining) processes.[12] Thus logically and properly the Regulations from the very first specified (see fn. 9, *supra*) that the "gross income from the [raw mineral] property" could not include what was in reality paid or received for the processing beyond a certain initial state for the refining or for the manufacturing of a taxpayer's ore into something else, – in this instance it happens to be liquid mercury. This, we submit, was a perfectly valid regulatory rule carrying out

[12] In *Brea Cannon Oil Co.* v. *Commissioner*, *supra*, p. 68, this was conceded. See, also, *Helvering* v. *Bankline Oil Co.*, *supra*, pp. 365, 367–369, where, as here, the particular taxpayer had to process in order to get a salable commodity.

the intent of the statute. *Brea Cannon Oil Co.* v. *Commissioner, supra; Consumers Natural Gas Co.* v. *Commissioner, supra; Greensboro Gas Co.* v. *Commissioner, supra.* See, too, *Helvering* v. *Wilshire Oil Co.,* 308 U. S. 90, 102. Moreover, the several successive subsequent reenactments of the same statutory provisions for percentage depletion in the case of mines constitutes the strongest possible evidence that Congress approved the regulation as a proper interpretation of the statute. Cf. *Helvering* v. *Winmill,* 305 U. S. 79, 82–83; *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 302–303.

(b) For several reasons the exchange of views among a few Senators on the floor of the United States Senate during the debate on the Revenue Act of 1942 cited in taxpayer's brief (pp. 27–30) is without significance in the present litigation. First, in construing a statute recourse is permissible to Congressional debates, in order to ascertain the intent of Congress, only where there was a contemporaneous exposition of the particular legislative provisions on the floor of Congress.[13] Thus the views expressed by two or three Senators in 1942 as to their understanding of the purpose and meaning of statutory provisions passed in 1932, and reenacted in 1934, 1936, 1938 and as a part of the Internal Revenue Code in 1939, are unimportant. The views may be expressed in the utmost good faith, but still they are unimportant under the safeguarding rule just mentioned. Moreover, the particu-

[13] The cases which taxpayers cite (Br. 30–31) all support this principle, and not the principle for which they are cited.

lar senatorial statements quoted in taxpayer's brief are in part self-contradictory, in part are statements of hearsay, and the part most emphasized in taxpayer's brief (p. 29) represents the particular Senator's personal deduction or conclusion, which notably is in substantial contradiction to what he said he had been told.[14] If Congress chooses to amend the statute, prospectively or retroactively, to provide that the depletion allowance in the case of the mining of quicksilver ores shall not be based upon the value of the crude cinnabar ore when extracted from the mine but upon the sale price of the ultimate product *as enhanced* by furnacing and refining operations applied to the ores, that would be a quite different matter, and one, of course, within the province of Congress to limit, deny, condition or grant deductions as it deems proper.

(c) The facts of these cases plainly bring the several taxpayers within the terms of the Regulations. Taxpayers did not crush the cinnabar ore and concentrate

[14] It was the Senator's own conclusion (Pet. Br. 29) as to how the furnacing of quicksilver ores must be treated under the Regulations. Actually there is and has been no variance, as taxpayers suggest (Pet. Br. 31), between the position of the Commissioner and the position of the General Counsel for the Treasury on the matter: That the gross income of a taxpayer from mining cinnabar ore must be determined, in accordance with the Treasury Regulations, by excluding from the price received for his refined product, i. e., liquid mercury, his furnacing, cleaning, flasking and transportation costs and the part of his total profits on his combined mining, refining and transportation operations which is in proportion to such furnacing and other refining and transportation costs.

it by gravity or flotation, and they make no pretense that they did.[15] They used other processes, but by them they beneficiated the crude mineral product in a very much greater degree than if they had merely crushed and concentrated the cinnabar by gravity or by flotation and the Tax Court upon ample evidence[16] properly so found. (R. 100–101.) Its finding on this aspect of the case, therefore, seems unassailable. *Dobson* v. *Commissioner* (Sup. Ct.), decided December 20, 1943 (1943 P-H, par. 62,029); *Wilmington Trust Co.* v. *Commissioner,* 316 U. S. 164; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 295.

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[15] Concentration (whether of quicksilver bearing or of other ores) by gravity or by flotation is a purely mechanical process and does not involve the application of heat. (R. 68, 100–101.) It is physically and technically possible to concentrate cinnabar by gravity or by flotation but it is uneconomical, and none of the taxpayers concentrated cinnabar by either of such methods during the tax years. (R. 100; see, also, R. 65, 66–67.) New Idria's predecessors in title did concentrate cinnabar for a time, but this operation was stopped before the tax years when modern furnaces for roasting cinnabar ore were installed. (R. 86.)

[16] The recovery by roasting the cinnabar ore in taxpayers' revolving furnaces and in concentrating and distilling the gases is always better than 97 per cent of the quicksilver in the ores, whereas but only 60 to 80 per cent of the quicksilver in the cinnabar ore is recovered if the cinnabar is first concentrated by gravity or flotation. (R. 81.) Moreover, mere concentration effects no chemical change in the cinnabar ore (R. 67–68), for the concentrated ore must still be retorted and further processed (R. 72, 76, 93–94). Upon the other hand, when cinnabar ore is put through taxpayers' revolving furnace process its chemical composition changes and practically pure mercury or quicksilver results from the condensation and distillation of the gases liberated in the roasting process. (R. 68, 71, 77.)

In such circumstances the regulation applies and, being valid as we have already seen, it controls. Thus, under the Regulations a mine owner's gross income from his crude mineral product does not include the part of the sale price of his ultimate refined or manufactured product attributable to transportation, or to refining and manufacturing processes and the profit realized on them, or, more precisely, to the part of the sale price of his ultimate product which is attributable to any process after extraction of the crude mineral product from the earth (save crushing and concentrating by gravity or flotation), which beneficiates that product in greater degree (in relation to its crude state on the one hand and the refined product on the other) than crushing and concentrating by gravity or flotation.

(d) The amendment (see fn. 10, *supra*) to Article 23 (m)–1, Treasury Regulations 101, by T. D. 4960, 1940–1 Cum. Bull. 38, 39, promulgated January 3, 1940, was the result of the Treasury Department's realization that the Regulations as written might seem to give the operator-processor of certain kinds of mineral mines an advantage to which he was not entitled. Where the operator-processor sells his ultimate product at an over-all profit, that profit is not necessarily a result of just his mining operations, but is the result of *the sum of* his mining, further processing, refining and manufacturing operations, including transportation.

Congress had allowed mine operators a depletion allowance in the case of mineral mines of 15 per cent

of "gross income from the property" being depleted, i. e., of gross income from *the crude ore.* This would seem to exclude a deduction of a percentage of gross income from other sources. Cf. *Brea Cannon Oil Co.* v. *Commissioner, supra,* p. 69; *Consumers Natural Gas Co.* v. *Commissioner, supra,* pp. 161–162; *Helvering* v. *Bankline Oil Co., supra.* Where the combined or consecutive operations (of mining and refining or other nonexcepted processing) are conducted at an over-all net profit, a taxpayer's gross income from such non-mining operations is something different from the mere cost of such operations. The over-all net profit has its source, in part, in such other operations, and in part presumably is a profit on those operations.[17]

For that reason Article 23 (m)–1 (g) of Treasury Regulations 101 was amended (and renumbered as (f)) to make it very certain and clear that the depletion permitted is on "the gross income from" the crude mineral and not on the gross income from nonexcepted processing, viz, refining, manufacturing and so forth, to which a taxpayer's crude mineral may be subjected upon being mined. Thus taxpayers were advised that they could not claim a depletion deduction upon either their gross income from nonexcepted processing, refining or manufacturing of extracted

[17] These other operations require capital investment and management functions just as much as the investment in the mine and mining equipment. Obviously the operator of a quicksilver or cinnabar ore mine should expect a return on his investment in the furnacing, condensing and other equipment just as much as a return on his investment in the ores in place.

minerals or upon their net profits from such sources. This certainly was a correct statement of the rule prescribed by statute that the percentage depletion should be a stated percentage of the "gross income from" the property, i. e., the crude mineral product. As such, it was valid whether made effective prospectively only or also retroactively. Cf. *Murphy Oil Co.* v. *Burnet, supra,* pp. 303–304, 306–307, where a Treasury Regulation, as amended by a Treasury Decision on November 13, 1926, was held to determine the amount of depletion allowable to a taxpayer for the tax years 1919 and 1920. See, also, *Manhattan Co.* v. *Commissioner,* 297 U. S. 129, 135; *Morrissey* v. *Commissioner,* 296 U. S. 344, 355. Obviously the amendment to the regulation, Article 23 (m)–1 (g), Treasury Regulations 101, was effective for the tax year in which it occurred and subsequent years. *Helvering* v. *Wilshire Oil Co., supra; Helvering* v. *Reynolds,* 313 U. S. 428. As previously mentioned, only New Idria Quicksilver Mining Company is concerned with the question whether the amendment was effective as to the tax year 1939. That it was we submit is clear under the principle of the *Murphy Oil Co.* case and the other cases cited therewith, *supra.*

(e) We quite agree with taxpayers' thesis (Br. 21–24) that the Commissioner cannot promulgate Regulations inconsistent with the statute. He has not done so here. On the contrary, and as we have already pointed out, the Commissioner's Regulations which are involved here only carry into effect the will of Congress as expressed by the statute, namely, that persons engaged in metal mining shall receive, if they

elect it, a depletion allowance of 15 per centum of their "gross income from" their crude mineral resource. That is all the statute authorizes. That is all they are entitled to get. They cannot increase their depletion allowance by doing other things to their product, viz, refining it, after they mine it.

Only *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, out of the remaining cases cited in sections (1) to (4) of taxpayers' brief needs further comment. The facts there were as follows: A refining company had entered into a contract with Wyoming, a subsidiary of Mountain Producers, to drill Wyoming's leaseholds and operate any producing wells without cost to Wyoming and to purchase the oil from the properties under an agreed price scale. The Commissioner allowed Wyoming percentage depletion upon the cash payments it received from the refining company under the contract. The taxpayer and Wyoming insisted that the latter's "gross income from the property", subject to percentage depletion, was what the refining company paid Wyoming under the contract *plus* the cost of production defrayed by the refining company. The Supreme Court sustained the Commissioner. Somewhat similarly here these taxpayers, who did their own mining and then put their crude cinnabar ore through elaborate subsequent processes (furnacing, drawing off the gases, condensing them and cleaning and flasking the product) are not entitled to treat as gross income from their crude mineral what in reality they received from the furnacing and other processing and the profit apportionable to such post-mining operations.

The Supreme Court, it may be noted, decided *Helvering* v. *Mountain Producers Corp., supra,* on the same day as *Helvering* v. *Bankline Oil Co., supra,* already cited in this brief. The *Bankline* decision plainly supports the Tax Court's conclusion on the present issue in these cases, for in the *Bankline* case the Supreme Court held that the treatment of the raw product of an oil well to secure a commercially marketable product was *a processing* and not a mining operation *and that percentage depletion was not allowable to a processor upon his gross processing income.*

II

The New Idria Quicksilver Mining Company was not entitled to percentage depletion in respect to its gross income from the "dump" material which others had dumped upon the land

As a more or less incidental operation the New Idria Quicksilver Mining Company processed some of the previously untreated cinnabar ore and some of the ore already treated by previous owners which New Idria found in great piles or dumps upon its land when it acquired the land in 1936. The dump ore had been mined from the land which New Idria bought by New Idria's predecessors in title to that land and deposited there and remained in such dumps until New Idria removed and furnaced and treated it for its mercury content during the tax years. (R. 29, 31–34.) The Commissioner argued before the Tax Court that New Idria was not entitled to a deduction for depletion in respect to its gross income from the dump

ores, and the Tax Court sustained the contention, holding, in short, that the gross income New Idria received from or for dump ores was not income from the operation of its mine and, therefore, was not a depletable interest. (See R. 106.) This conclusion seems correct.

We grant that if New Idria had mined the cinnabar ore and treated it insufficiently at the time or not treated it at all, but subsequently put it through its mills, it would have been entitled to percentage depletion in respect to its gross income from the crude mineral. *Commissioner* v. *Kennedy Min. & M. Co.*, 125 F. 2d 399 (C. C. A. 9th). But that is not what occurred. Others mined the ore and deposited it before New Idria even came into existence.[18] New Idria merely acquired the dumps along with the land upon which they were located. The dump material was not a part of any mine when New Idria bought it or thereafter. If depletion is restricted, as the cases indicate, to a person having an economic interest in the crude minerals in place in the earth on account of the mining or removal of such ores, it would seem that New Idria was not entitled to a deduction for depletion when it undertook to move, crush, and screen the dump ore preliminary to furnacing and otherwise processing and refining it.[19] New Idria's entire activities with respect

[18] New Idria was organized July 3, 1936. (R. 28.)

[19] In any event and for precisely the reasons set forth in section I of this Argument, New Idria Quicksilver Mining Company was not entitled to depletion on its gross income *from roasting and otherwise processing* the crude dump ores into refined and marketable liquid mercury, those being non-excepted processing, refining or manufacturing operations.

to the dump material would seem much more nearly akin to those of the processor in *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 368, who, the Supreme Court held, had no right whatever to a deduction for depletion. See, also, *Consolidated G. & S. M. Co.* v. *Commissioner,* 133 F. 2d 440 (C. C. A. 9th); *Atlas Milling Co.* v. *Jones,* 115 F. 2d 61 (C. C. A. 10th), certiorari denied, 312 U. S. 686. Cf. *Texas Pipe Line Co.* v. *Commissioner,* 88 F. 2d 278 (C. C. A. 3d), certiorari denied, 302 U. S. 706.[20]

III

Oat Hill Mine Inc., is not entitled to a deduction from its income for any part of the $3,750 it paid to an electric company during the tax year 1940 for an extension of a power line to the Oat Hill Mine

Oat Hill Mine, Inc., did not pay the $3,750 to Pacific Gas & Electric Company for current service of any character or as an advance payment for future service. It paid the $3,750 to secure the extension of a transmission line to its property. We do not know the expected useful life of such facilities, and in any event they belong to Pacific Gas & Electric Company under the contract between the parties. (R. 59.) Moreover, Oat Hill's contract with Pacific provided that—after 36 consecutive months of use if Oat Hill's business had

[20] Cf. also, *So. Utah Mines* v. *Beaver County,* 262 U. S. 325, holding copper tailings, all of which apparently were the residue of ore removed from the mining claims of Utah Mines or of its predecessor in title, deposited in dumps near the concentration mill which seems to have been on a separate mining claim belonging to Utah Mines, *did not constitute a mine* taxable as such under the laws of the State of Utah.

at that time proved its permanency to the electric company's satisfaction—the latter should "repay" to Oat Hill the $3,750 it had paid to induce the construction, save for a portion which would itself thereafter be refunded in accordance with the company's practice. (R. 60.)

A witness for Oat Hill testified (R. 84) that at the time Oat Hill made its payment he thought the mining operations at the Oat Hill property would last "as long as the war," in which we were not yet engaged, and which, the witness speculated, "might have been three years, possibly less."

Obviously no part of the $3,750 deposit may be deducted by Oat Hill from its year 1940 income. The full deposit probably has been repaid to Oat Hill before this. But even assuming, *arguendo,* that Oat Hill may never get the $3,750 back, the money so paid, as the Tax Court noted (R. 107–108), was in the nature of a capital investment within the principle of *Duffy* v. *Central R. R.,* 268 U. S. 55,[21] and the period of service which the deposit made possible was "an indefinite period" (R. 108). This would not support a deduction for depreciation or exhaustion of the investment over any period. Cf. *Clark Thread Co.* v. *Commissioner,* 100 F. 2d 257, 258 (C. C. A. 3d). The ideas of Oat Hill's witness as to how long the war and the cinnabar mining operations at Oat Hill would last were, of course, too speculative and indefinite to support any deduction allowance, and the Tax Court

[21] Cf. *Weiss* v. *Wiener,* 279 U. S. 333; *Murphy Oil Co.* v. *Burnet,* 55 F. 2d 17, 25–26 (C. C. A. 9th).

properly so held. (R. 109.) Thus, for two reasons, each of them sufficient, no part of the $3,750 payment may be deducted from Oat Hill's gross income for the year 1940: First, the payment was refundable; and, second, even if never refunded it was a capital investment to induce service for "an indefinite period."

CONCLUSION

The decision of the Tax Court was correct upon each of the several issues raised by these appeals and its decision, in each of the several cases, should accordingly be affirmed.

Respectfully submitted.

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FEBRUARY 1944.

APPENDIX

Internal Revenue Code:[1]

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

(1) *In general.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * * and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance

[1] The provisions of the Revenue Act of 1938, c. 289, 52 Stat. 447, of pertinence only to the case of the New Idria Quicksilver Mining Company for its fiscal years 1938 and 1939, are similar to the correspondingly numbered provisions of the Internal Revenue Code and hence are not quoted here.

under this subsection for subsequent taxable years shall be based upon such revised estimate. In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * *

(26 U. S. C. 1940 ed., Sec. 23.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; * * *

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * *

(26 U. S. C. 1940 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsoles-

cence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

(b) *Basis for Depletion.*—

(1) *General Rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * *

(4) *Percentage Depletion for Coal and Metal Mines and Sulphur.*—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. * * *

(26 U. S. C. 1940 ed., Sec. 114.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.23 (m)–1. *Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.*—Section 23 (m) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements. Section

114 prescribes the bases upon which depreciation and depletion are to be allowed.

Under such provisions, the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production. Thus, an agreement between the owner of an economic interest and another entitling the latter to purchase the product upon production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest.

* * * * *

When used in these sections (19.23 (m)–1 to 19.23 (m)–28, inclusive) covering depletion and depreciation—

* * * * *

(*b*) A "mineral property" is the mineral deposit, the development and plant necessary for its extraction, and so much of the surface of the land only as is necessary for purposes of mineral extraction. The value of a mineral property is the combined value of its component parts.

(*c*) The term "mineral deposit" refers to minerals in place. The cost of a mineral deposit is that proportion of the total cost of the mineral property which the value of the deposit bears

to the value of the property at the time of its purchase.

* * * * *

(*f*) "Gross income from property," as used in section 114 (b) (3) and (4) and sections 19.23 (m)–1 to 19.23 (m)–28, inclusive, means the amount for which the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine or well, but, if the product is transported or processed (other than by the processes excepted below) before sale, it means the representative market or field price (as of the date of sale) of crude mineral product of like kind and grade before such transportation or processing. If there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude state is merely transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation and the processes not listed below. The processes excepted are as follows:

(1) In the case of coal—cleaning, breaking, sizing, and loading at the mine for shipment;

(2) In the case of sulphur—pumping to vats, cooling, breaking, and loading at the mine for shipment;

(3) In the case of iron ore and ores which are customarily sold in the form of the crude mineral product—sorting or concentrating to bring to shipping grade, and loading at the mine for shipment; and

(4) In the case of lead, zinc, copper, gold, or silver ores and ores which are not customarily sold in the form of the crude mineral product—crushing, concentrating (by gravity or flotation), and other processes to the extent to which they do not beneficiate the product in greater

degree (in relation to the crude mineral product on the one hand and the refined product on the other) than crushing and concentrating (by gravity or flotation).

In case any of the excepted processes are not applied in the immediate vicinity of the mining district in which the mine is located, costs incurred for transportation to the processing location and, if transported by taxpayer, the proportionate profits attributable to transportation should be subtracted from the sale price of the product to determine "gross income from the property."

In the case of oil and gas, if the crude mineral product is not sold on the property but is manufactured or converted into a refined product or is transported from the property prior to the sale, then the "gross income from the property" shall be assumed to be equivalent to the market or field price of the oil or gas before conversion or transportation.

* * * * *

(*g*) "Net income of the taxpayer (computed without allowance for depletion) from the property," as used in section 114 (b) (2), (3), and (4) and sections 19.23 (m)–1 to 19.23 (m)–28, inclusive, means the "gross income from the property" as defined in paragraph (*f*) of this section less the allowable deductions attributable to the mineral property upon which the depletion is claimed and the allowable deductions attributable to the processes listed in paragraph (*f*) in so far as they relate to the product of such property, including overhead and operating expenses, development costs properly charged to expense, depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion. Deductions not directly attributable to particular properties or processes shall be fairly allocated. To illustrate: In cases where the taxpayer engages in

activities in addition to mineral extraction and to the processes listed in paragraph (*f*), deductions for depreciation, taxes, general expenses, and overhead, which cannot be directly attributed to any specific activity, shall be fairly apportioned between (1) the mineral extraction and the processes listed in paragraph (*f*) and (2) the additional activities, taking into account the ratio which the operating expenses directly attributable to the mineral extraction and the processes listed in paragraph (*f*) bear to the operating expenses directly attributable to the additional activities. If more than one mineral property is involved, the deductions apportioned to the mineral extraction and the processes listed in paragraph (*f*) shall, in turn, be fairly apportioned to the several properties, taking into account their relative production.

(*h*) "Crude mineral product," as used in paragraph (*f*) of this section, means the product in the form in which it emerges from the mine or well.

* * * * *

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Nos. 10,589, 10,590, 10,591, 10,592

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

4

NEW IDRIA QUICKSILVER MINING COMPANY (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,589
KLAU MINE, INC. (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,590
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WILD HORSE QUICKSILVER MINING CO. (a corporation), *Petitioner,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. 10,592

On Petition for Review of Decisions of the Tax Court of the United States.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

I.

THE HISTORY AND RATIONAL INTERPRETATION OF "GROSS INCOME FROM THE PROPERTY".

Respondent throughout his brief stresses the idea that the words "gross income from the property" are equivalent to the "market or field price of the raw material before conversion" (R. Br. 14), and again that it is equivalent to the "gross income from the raw product". (R. Br. 18.) Then he stretches gross income from meaning the returns from sales of the raw mineral product or market value of a salable product to a calculated value of the product at the mouth of the mine. He says (p. 20):

> "In the face of the legislative history detailed above we think it impossible for anyone to maintain that, by the 'extension' of percentage depletion to metal mines, Congress intended to authorize depletion upon the enhanced sale price of an ultimate product which is the result of applying—to the raw mineral product brought out of the mine—non-excepted processes, whether refining, manufacturing, or otherwise. The fundamental purpose of a depletion deduction was a compensatory allowance to owners, on account of severance of their natural resource when consumed in the production of income, and this is just as true where the statute allows a deduction based on 'gross income from the property' as where the depletion is based on cost or on discovery value."

He goes on to say (p. 21):

> "Ordinarily a market price exists for the raw mineral product as it is produced. Where this is so the 'gross income from the property' is the

> sale price of *the crude mineral* product in the immediate vicinity of the mine or well. One object of the Regulations is the determination of an equivalent of such fair market price for the raw product in instances where elaborate processing of the crude mineral is necessary to get a marketable product."

We dispute both the respondent's summation of legislative history and his interpretation of what Congress intended to accomplish by percentage depletion. In support of this position we advert to an authority whom we think respondent himself will endorse.

Mr. Randolph E. Paul, now general counsel for the Treasury at all hearings on income tax laws before the Congressional committees, in 1934 joined with Mr. Jacob Mertens, Jr. of the New York Bar in writing an exhaustive work on the Law of Federal Income Taxation. In volume 2, section 21.53 of this work, the history of depletion allowances in metal mines is briefly and comprehensively stated as follows (pp. 755-756):

> "Section 21.53. *Discovery Depletion Generally.* At the instance of the oil and mining companies there was inserted for the first time in the 1918 statute a provision for a more favorable treatment of taxpayers *discovering* mineral properties, giving such taxpayers the benefit of depleting the value at the date of discovery, or within 30 days thereafter. The valuation was required to be made as of this period and not as of a subsequent period, and constituted a basis for

depletion, and not for gain or loss on the sale of properties.

At the time the 1921 statute was in the process of enactment it was deemed that the previous statute treated discoverers more favorably than had perhaps been intended and the result was a limitation that the depletion allowance based on discovery value should not exceed the net income from the property upon which the discovery was made. This limitation was dropped from 100% in the 1921 Act to 50% of the net income in the 1924 Act. In the 1926 Act Congress showed its dissatisfaction even with the limitations it had adopted and departed altogether from the discovery provision with respect to *oil and gas* properties, inserting in lieu thereof a flat or arbitrary 'percentage depletion' of 27½% of the gross income from the property and 50% of the net income. The discovery provisions were continued with respect to mines with some changes in definition of discovery.

The 1928 Act continued percentage depletion in the case of oil and gas wells and valuation discovery depletion in the case of mines. Substantial changes were made in the 1932 Act. Percentage depletion was extended to coal, metal and sulphur mines—5% in the case of coal mines; 15% in the case of metal mines; and 23% in the case of sulphur mines—these percentages being based, as in the case of oil and gas properties, upon the gross income from the property and being also limited to 50% of the net income."

In a footnote to the above statement, Mr. Paul's work quotes a former solicitor of the Bureau as follows (p. 756):

> "In Hearings before the Congressional Committee investigating the Bureau of Internal Revenue, it was said in 1925 by A. W. Gregg, formerly Solicitor of Internal Revenue: 'If something could be done in the law to do away with the necessity for valuing mineral properties for the purpose of determining depletion, it would be the biggest thing that has ever been done for the Bureau of Internal Revenue'.
>
> Much was accomplished by the elimination of discovery valuation except in so far as it still remains in a relatively unimportant way."

From the foregoing quotation it will be seen that what Congress was trying to do in extending percentage depletion to metal mines was to get away from the uncertainties which had been attendant upon attempts to value mineral in place. Discovery depletion had been thoroughly unsatisfactory to the Treasury, and the principal reason for that dissatisfaction, it may be assumed with reasonable certainty, was the difficulty which Treasury representatives had had in combatting the valuation figures of experts for mineral-producing taxpayers who were undoubtedly much more familiar with the properties than the Treasury representatives could have been. Congress said that the basis for percentage depletion would be "gross income from the property". It did *not* say the basis would be "calculated hypothetical sales value of an unsalable raw material in transit from its original status as ore in place to its first marketable form". What Congress sought to accomplish through the extension of percentage depletion to metal mines was

an elimination of these uncertainties, and to accomplish, by a simple reference to gross receipts from the sale of the first marketable product, a clear-cut basis for computing depletion. It selected a percentage for application to this basis *which took into account the fact* that certain mining and milling processes would normally have to be completed in order to obtain a marketable product. It is notable that in the case of oil wells where capital costs are relatively heavy and production costs relatively low, 27½% was adopted as the basis for percentage depletion. In the case of metal mines only 15% was allowed. In both cases an alternative limit of 50% of the net income from the property, which had applied since 1924 under discovery depletion, was carried forward in the percentage depletion acts. It was undoubtedly true that Congress did not intend to allow depletion on the cost of processing crude products beyond their first marketable form, but by the same token it did not intend to disallow depletion on the sales value of a mineral product whose first marketable form might be pure metal. Frequently in high grade gold mines gold nuggets or high grade quartz are mined which produce gold in its native form. Congress did not intend to penalize the owners of such mines because their first marketable product was in the form of pure mineral. It did not do so in the case of high gravity oil fields. When it came to metals that are ordinarily sold either in the form of their ores or of their concentrates, it undoubtedly intended that the gross income should be computed on the current sales price of such ore or concentrates,

and that no discrimination should be made in favor of producers who not only brought their product to the stage of the first marketable product, but continued refining processes to a much greater extent and produced a still more valuable marketable product by so doing.

It is our earnest belief that the Treasury in first promulgating its Regulations intended to accomplish this same result; that in all of the provisions of Regulations No. 103, Section 19.23 (m)-1-(f)-(4), the use of the words "beneficiate" and "beneficiation" was intended in an *economic* rather than a *physical* sense. The specification of "lead, zinc, copper, gold and silver" ores shows that what the Treasury had in mind was that the producers of those ores should not be allowed to deplete a cost of processing which took them beyond what is usually, though not always, the first marketable product, viz., concentrates, ready for the smelter. The Regulation does not mention mercury, and the reason probably is that at the time the Regulation was promulgated the mining of quicksilver in this country, due to foreign cartel competition, was at a very low ebb and no quicksilver mining cases had been brought to the attention of the Treasury. When the present cases finally arose the respondent was confronted with a situation where the Regulation above referred to if applied in a purely physical sense did not provide for depletion of the gross income derived from sale of the first marketable product. Instead of interpreting the language of the Regulations in an economic sense, respondent took it

in a literally physical sense and the Tax Court followed him in this respect. We submit that it was a gross distortion of the intent of Congress to do so. No authority cited by respondent supports such an interpretation, and it is therefore meaningless to say that subsequent reenactments of the statute gave it weight.

II.

FURNACING DOES NOT BENEFICIATE QUICKSILVER ORES MORE THAN GRAVITY CONCENTRATION IN AN ECONOMIC SENSE.

In his brief (p. 6) respondent urges that the Tax Court found that the processes of furnacing the crushed cinnabar ore and condensing, cleaning and flasking the mercury vapors obtained from such operation " 'beneficiated the product in a greater degree than "crushing" and "concentrating" ' the cinnabar by the gravity or flotation method," and that this finding is not open to attack. The petitioners' witnesses, all of whom were well qualified to speak, testified *without contradiction* that the concentration of mercury ores by furnacing and condensation was a purely physical process and was comparable, in its economic effect in obtaining from the ore the first marketable product, to concentration of gold and silver ores by gravity. They testified that concentration by gravity of quicksilver ores had been attempted but had not produced a marketable product, and that it was still necessary after such concentration to furnace the concentrates and condense the vapors

therefrom, and even then there would not be as high a recovery as would be obtained by furnacing the ore direct. In a physical sense therefore it is of course true that the furnacing of the ore beneficiated it to a greater extent than the concentration by gravity because gravity concentration did not beneficiate the ore at all. The concentrates have no sale value. Concentrating merely eliminated some waste material. The concentrates still have to be furnaced. Due to the loss of metal in the concentrating process, there would be less return to the producer after gravity concentration followed by roasting than by directly furnacing the crude ore without concentration. The Tax Court's finding amounts to nothing more than an assertion of the self-evident fact that the producers could (though none of them do) adopt an uneconomical method of beneficiation under which furnacing might follow concentration, and therefore constitute further beneficiation in a physical sense. However, the Tax Court did not find, and no witness testified, that furnacing of quicksilver ore in an economic sense—that is, in the production of a marketable product—accomplishes anything more than gravity concentration of gold and silver ores effects. A comparison of the value of metallic mercury with the value of gold and silver concentrates would of course be meaningless, but a comparison of the economic condition of the product, namely, its readiness for market, shows that the furnacing of quicksilver ore accomplished exactly what the gravity concentration of most gold and silver ores would accomplish and nothing more.

It beneficiates the crude ore to its first marketable form.

The testimony which we have summarized is found in the statements of Walter Bradley, State Mineralogist (R. 71-72); Worthen Bradley, President of Bradley Mining Co., operating the Sulphur Bank Quicksilver Mine (R. 75-77); and H. W. Gould, General Manager of the New Idria Quicksilver Mine. (R. 80.) All of the authorities cited by respondent are analyzed and quoted in our opening brief. Petitioners there draw conclusions from them at total variance with those of respondent and the Tax Court.

We may summarize briefly the arguments under the heading of the first two sections of our brief as follows:

(1) That historically percentage depletion was intended to substitute for the uncertain and speculative computations of discovery depletion, a certain definite basis ascertainable from the taxpayer's books, which when multiplied by the allowed percentage, would give an approximate compensatory deduction for the wastage of mineral land capital value due to production.

(2) That it was not the intent of Congress to carry that base back to the value of the ore in place. That is what discovery depletion did. To do so involves many of the objectionable hypothetical calculations which caused discovery depletion to be discarded. It was rather the intent of Congress in 1932 and in subsequent acts to establish a market sales value base

for the first *marketable* product of the mine, to which statutory fixed percentages could be applied, thereby allowing the taxpayer an approximate compensable deduction from income for capital wastage, and thereby avoiding the taxing of capital under the guise of income.

(3) That the physical condition of the product was not a matter of any concern to Congress, but its economic condition was the determining factor. When the ore was reduced to a stage where it could be sold at a definite market price, then "gross income from the property" could be accurately computed on the basis of the sales value in that form, and a depletion basis determined upon that computation rather than upon engineering estimates of valuation or theoretical apportionment of costs and profits.

(4) That in retaining the 50% net limitation, Congress provided adequately for protection of the Government in those cases where high sales prices might be incident to or caused by certain extensive mining or high processing costs required to bring the product to a marketable stage. In such cases the 15% of the gross income might well be, and frequently is, in excess of 50% of the net income, but the taxpayer would only get the latter deduction.

(5) That the attempt of the respondent in this case to subtract processing costs essential to bring the product to a marketable form and then to allow a deduction of only 15% of the residual income after subtracting those costs (plus hypothetical profits)

does violence to the obvious intent of allowing 15% of the *gross* income as the upper alternative. As pointed out in our opening brief, what the Commissioner has done is in effect to apply the *15%* to *net income plus the cost of mining,* where Congress intended *50%* to be the alternative allowable percentage of net income.

III.

PETITIONERS' ARGUMENT RESPECTING THE ARBITRARY, SENSELESS APPORTIONMENT AND DEDUCTION OF PROFITS REMAINS UNANSWERED.

No argument in this case has had less logical justification than the argument contained in respondent's brief, pages 25-27, with respect to the allocation of profits to mining operations. Respondent seems unable or unwilling to realize that profit from mining operations is not based on the cost of mining. It is simply reduced by the cost. Metals have a value in a world market. For the most part, that value is wholly unrelated to the cost of production. It depends upon supply and demand, upon the scarcity or abundance of the metal in question and upon the value of the uses to which it may be put. The other principal factor is the quantity and degree of concentration of the metal in place and its accessibility to market. These factors cause the profit. The metal has to be mined. This costs money. It has to be processed to a greater or lesser extent to obtain a marketable product. This costs money. These costs

reduce the profit. But except where processing is carried beyond the first marketable product stage by commercial smelters or processing plants, there is no profit attachable to the operations themselves. It is the ownership of the mine or the ore in it and the market price of the product which determine whether or not there may be a profit on production of said ore after deducting the costs necessary therefor. If the ore were fully blocked out in the mine most of the net profit might be realized from a sale of the mine itself instead of producing it. The attempt to segregate this over-all profit according to the cost of different operations is shown in our opening brief to be productive of ridiculous results (Opening Brief pp. 42-44), and no attempt has been made by either the respondent or the Tax Court to overcome the force of these arguments. Respondent contents himself with reiteration (p. 25) that the profit is the result of mining, further processing, refining and manufacturing operations, including transportation. We would be interested to see the respondent or anybody else try to base the selling price of his mineral product on such considerations. His price would either be away below the market, with consequent loss to himself, or away above the market, in which case he would have no takers for his product.

IV.

CONGRESS HAS NOW FULLY CORROBORATED PETITIONERS' POSITION AND REBUKED THE TREASURY, BY INCORPORATING RETROACTIVELY IN THE 1943 REVENUE ACT THE VERY DEFINITION OF GROSS INCOME FROM THE PROPERTY WHICH PETITIONERS CONTEND HAS ALWAYS BEEN THE INTENT OF THE PERCENTAGE DEPLETION SECTIONS.

We include a copy of the amendment to Section 114 (b) (4), which has just been passed by Congress over the President's veto, in the Appendix to this brief. It expressly directs that gross income from mining quicksilver ores shall include the furnacing of the same, and this provision is made retroactive to all taxable years beginning after December 31, 1931. So far as we can see, this ends the dispute and entitles petitioners to a reversal of the Tax Court in this case. Respondent may quibble that the word "furnacing", as used in this case, was separated from "condensing, cleaning and flasking". This separation of costs was made by the petitioner taxpayer at the instance of respondent's representatives. The word "furnacing", like the word "milling", ordinarily includes all of the operations which take place in reduction of quicksilver ore to a marketable product. Technically speaking, the heating of the ore in the furnace would reduce its mercury content to a vapor form, which could not possibly be handled, to say nothing of being sold, until it was condensed in the condensers which are connected with the furnace and poured into flasks, after being cleaned of soot and other impurities. The cost of these latter operations

is quite small compared with the furnacing cost as segregated in this record (R. 8 and 37-47), and in the stipulation of facts in typewritten records in the consolidated cases. The obvious intent of Congress, as shown in the amendment to Section 114 (b) (4) of the Revenue Code by adding a definition of gross income from the property was to insure that mine owners were allowed depletion on those operations which are normally applied to obtain *commercially marketable mineral products. The amendment so states.* The condensing, cleaning and flasking of the quicksilver is just as essential to obtaining a commercial marketable product as is the roasting of the ore in the furnace. We submit therefore that the word "furnacing" as used in the new Act was intended to and does include all of the processes, the cost of which, with assigned profits, have been deducted by the respondent herein. Inasmuch as the amendment is made retroactive to cover the years involved in these cases, it amounts to a congressional mandate for the reversal of the Tax Court's judgment herein.

V.

THE NEW IDRIA DUMP ORES ARE DEPLETABLE.

Respondent in his brief makes one or two statements with respect to these dump ores which, we submit, are not supported by the evidence. He says (page 29) that New Idria "found" these ores in great piles or dumps upon its land when it acquired the land in

1936, the implication being that they were simply a new discovery not involved in consideration of the purchase price which New Idria paid for the properties. There is no evidence justifying such an assumption. It is a safe inference that the existence of these dumps was just as well known to New Idria when it bought the properties and probably better known than the existence of ore in place underground. At page 30 of his brief respondent states that the dump material was not a part of any mine when New Idria bought it or thereafter. There is no evidence to support that statement. On the contrary, the stipulated facts are that the dump material was always a part and parcel of the property from which it was taken, and that the right to further mine and process the material in the dumps passed down from owner to owner in exactly the same way as the right to mine and extract ore in place. The suggestion that New Idria has no economic interest in the ore in those dumps because they were mined by its predecessors in interest is to us a suggestion without meaning. New Idria acquired through its predecessors in interest every single right that they had ever had with respect to those ores, including the economic interest therein. There never had been any severance of the titles or the right to mine and further process said ores in the dumps from the right to mine and process them when they were in place in the ground. No right to deduct for depletion of the mine by extraction of ores had ever been exercised by any predecessor in interest. Therefore that right to take percentage depletion on the residual income therefrom

passed to New Idria when it acquired the property. This is not a case where the acquisition of a predecessor's cost basis for depletion is involved. It is a case where the right is involved to deduct on a gross income percentage basis for depletion of the mineral value of the land. Part of that mineral value is in the dump ores still located on and unsevered in title from the lands from which the ores were taken. What principle in reason, in justice, in statute or in the regulations should deprive the petitioner herein of the right to claim depletion on this value? We can find none. The extension of the ruling in *Commissioner v. Kennedy Mining & Milling Co.*, 125 Fed. (2d) 399 (C.C.A. 9), for which we contend in our opening brief, to the situation in the instant case will create no undesirable precedent, will not deprive the Treasury of one cent to which it was ever entitled, and will insure ordinary justice to this petitioner in taxing its income rather than its capital.

VI.

THE OAT HILL POWER DEDUCTION WAS PROPER.

The suggestion in respondent's brief, page 32, that Oat Hill Mine, Inc. has probably been repaid the $3750 deposit for power service is contrary to facts. It has not received, and never will receive, the deduction because the mine was closed down within just about the period estimated by the witness Gould. The suggestion that an estimate of this period was too speculative and indefinite to support any deduction

allowance is no answer to the argument that the deduction in question was purely an operating expense paid for electrical service for which no reimbursement was estimated to be due. Respondent offered no evidence to rebut the estimated life of the operation as given by petitioner's witnesses. We submit, therefore, that the deduction should all be allowed for the year in which it was paid, or else spread over this estimated period.

CONCLUSION.

The right to percentage depletion may be a "grace" of Congress. Nevertheless it is a grace founded upon sound reasoning, namely, that an income tax law shall not be made the basis for taxation of capital. Other provisions of the tax law, such as the excess profits tax, are designed to convert into the Federal Treasury any part of petitioners' income which may be unduly incremented by war conditions. Percentage depletion stands as a vested right given to petitioners by Congress to protect the wastage of their capital assets from being taxed as income. Percentage depletion was always intended to be calculated on the definite ascertainable basis of the market value of the first salable product. We think a correct interpretation of the Treasury regulations justifies this conclusion. Certainly the amendment to the revenue laws just enacted by Congress fully establishes this principle and reaffirms the construction placed on the sections in the Senatorial debate quoted in our opening brief. It necessarily follows that petitioners are right in

their appeal in this case, both in principle and in reliance upon the new retroactive statute.

The judgment of the Tax Court should be reversed and all of the additional assessments made by the respondent disallowed.

Dated, San Francisco, California,
March 3, 1944.

Respectfully submitted,
ROBERT M. SEARLS,
Attorney for Petitioners.

(Appendix Follows.)

Appendix.

Appendix

Section 124 (c) of the Revenue Act of 1943—Passed by Congress over a Presidential veto February 25, 1944.

Section 114 (b) (4) is amended by adding at the end thereof the following:

"(b) *Definition of Gross Income From Property.* As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining', as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground *but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products.* The term 'ordinary treatment processes', as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulfur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic,

(NOTE): Italics supplied for emphasis of relevant clauses.

or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), *or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles of this subparagraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 731 and 735.*"

"(d) * * * A provision having the effect of the amendment made by subsection (c) shall be deemed to be included in the revenue laws respectively applicable to taxable years beginning after December 31, 1931."

No. 10594

United States

Circuit Court of Appeals

For the Ninth Circuit.

WESTERN MESA OIL CORPORATION and EL SEGUNDO OIL COMPANY,

Appellants,

vs.

EDLOU COMPANY, et al., Landowners in El Segundo Community Lease No. Four-A; EDLOU COMPANY, et al., Landowners in El Segundo Community Lease No. Two-B; A. A. McCRAY, Trustee, for holders of overriding royalties in El Segundo Community Lease No. Four-A; A. A. McCRAY, Trustee for holders of overriding royalties in El Segundo Community Lease No. Two-B; A. A. McCRAY, WM. H. RAMSAUR and F. R. C. FENTON,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 590 Folsom St., San Francisco

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States Southern District of California Central Division

40852-B

In the Matter of

SOVEREIGN OIL CORPORATION, a corporation
Debtor

In Proceedings for Arrangement
Chapter XI

DEBTOR'S ORIGINAL PETITION IN PROCEEDINGS UNDER CHAPTER XI OF THE BANKRUPTCY ACT

To the Honorable the Judges of the District Court of the United States for the Southern District of California, Central Division:

The petition of Sovereign Oil Corporation, a corporation, respectfully represents:

1. The above named Debtor is a Nevada corporation and now has and for the longer portion of the six months immediately preceding the filing of this petition has had its office and principal place of busness at Los Angeles, in the County of Los Angeles, State of California, Southern District of California, and its present address is Suite 704 Park Central Building, 412 West Sixth Street.

2. The business of said corporation is the drilling and operation of oil wells and the marketing of products produced therefrom. The debtor is the owner of and is operating four oil wells upon real property situate in the County of Los Angeles,

State of California, all as set forth in the schedules attached hereto and made a part hereof. The debtor is using the said premises for this purpose under and pursuant to oil and gas leases between the owners of the premises as Lessor and the debtor as Lessee, or as holder of the Lessee's interest, all as set forth in said schedules attached hereto and made a part hereof. Under said leases a landowner's royalty as to the lease covering Community Well No. 1 of 16-2/3% is payable to the lessors, and as to the other three wells all as set [2] forth in said schedules, a landowner's royalty of 18- 2/3% is payable to the lessors.

3. Under a permit granted by the Corporation Commissioner of the State of California, the Debtor has issued and sold participating royalty interest in the gross proceeds from the production of the well covering percentages of said production, as follows: as to Community Well No. 1, 25½%, Community Well No. 2, 30%, Community Well No. 3, 34.75%, and Community Well No. 4, 29.75%.

4. The officers of said corporation are as follows:

D. M. Smith, President

J. R. McKinney, Vice President and Secretary

Martha L. Taylor, Assistant Secretary and Treasurer

5. Attached hereto as Exhibit "A" is a certified copy of a resolution of the board of directors of the above named debtor corporation authorizing the commencement and prosecution of the above entitled proceedings, which resolution was duly adopted at

a Special Meeting of said Board of Directors held June 18, 1942.

6. No Bankruptcy proceeding instituted by or against petition is now pending.

7. Petitioner is unable to pay its debts as they mature and proposes an arrangement with its unsecured creditors, as set forth in the proposed arrangement copy of which it attached hereto, marked Exhibit "B" and made a part hereof.

8. Annexed hereto, marked "Exhibit C" and hereby made a part hereof are the Schedules of the Debtor. The schedule hereto annexed marked "Schedule C" is verified by your petitioner's oath, contains a full and true statement of all its debts, insofar as it is possible to ascertain the names and places of residence of its creditors, and such further statements concerning said debts as are required by the provisions of the Acts of Congress relating to Bankruptcy. The schedule hereto annexed marked "Schedule D" is verified by your petitioner's oath, contains an accurate inventory of [3] all its property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

9. Annexed hereto, marked "Exhibit D" and hereby made a part hereof is a statement containing a full and true statement of all its executory contracts, as required by the provisions of said Act.

10. Annexed hereto, marked "Exhibit E". and hereby made a part hereof, and verified by your petitioner's oath, is a statement containing a full

and true statement of its affairs, as required by the provisions of said Act.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Acts of Congress relating to Bankruptcy, and further prays that a Receiver may be appointed of all of its assets and effects as provided for in the said proposed plan of arrangement.

Dated this 19th day of June, 1942.

SOVEREIGN OIL CORPORATION,
A Corporation.
By J. R. McKINNIE
Vice-President.
GRAINGER AND HUNT.
By REUBEN G. HUNT,
Attorneys for Debtor. [4]

State of California
County of Los Angeles—ss

J. R. McKinnie, being first duly sworn, deposes and says:

That he is the Vice President of the Sovereign Oil Corporation, debtor named in the foregoing petition. That he is authorized to make this verification for and on behalf of said corporation. That he has read the foregoing Debtor's petition under Chapter XI of the Bankruptcy Act and knows the contents thereof and makes solemn oath that the statements contained therein are true according to the best of his knowledge, information and belief.

J. R. McKINNIE

Subscribed and sworn to before me this 19th day of June, 1942.

[Seal] ADELE O. CARVER

Notary Public in and for County of Los Angeles, State of California [5]

CERTIFICATION

We, the undersigned, Vice-President, Secretary, and Assistant Secretary of Sovereign Oil Corporation, a corporation, do hereby certify that the following is a true and complete copy of a resolution duly adopted at a meeting of the Board of Directors of said corporation, duly called and held at the Main Office thereof at 412 West 6th Street, 704 Park Central Building, Los Angeles, California, on the 18th day of June, 1942, a quorum being present.

Dated: June 18th, 1942

[Seal] J. R. McKINNIE
Vice-President
J. R. McKINNIE
Secretary
M. L. TAYLOR
Assistant Secretary

After discussion and upon motion being duly made, seconded and carried, it was

"Resolved: That the Vice-President of this corporation be and he is *b*ereby authorized for and on behalf of the corporation to file and prosecute arrangement proceedings under Chapter XI of the

Bankruptcy Act and for this purpose to employ and pay counsel and to consent to or object to the appointment of a receiver, and to take all other steps that may be necessary to protest the interests of the corporation and its creditors and other parties in interest in connection with such proceedings and to submit any plan of arrangement to the creditors of the corporation and thereafter to submit any modified plan of arrangement to said creditors that may appear to him to be for the best interests of the corporation." [6]

EXHIBIT A

ARRANGEMENT

The debtor proposes the following arrangement with its unsecured creditors:

(a) R. P. Cooney shall, subject to the Court's approval, be appointed Receiver of the assets and property of the Debtor with authority to conduct the business and operations of the corporation, including the operation of the oil wells now owned and operated by the debtor, and will conduct same in such manner as, in his discretion, will accomplish the best results for all interested parties, either in the nature of maintaining the production or increasing the same by remedial operations. Said R. P. Cooney shall act without compensation.

(b) From the gross proceeds derived from the production of said wells there shall be paid in the

Exhibit A—(Continued)

order named the following charges, debts, and obligations of the corporation to the parties entitled thereto:

First: The landowners' royalties.

Second: The necessary operating expenses of the corporation.

Third: The actual necessary costs of administration of the Debtor's estate, exclusive of operating expenses, as fixed by the Court, including a reasonable compensation to the attorneys for Debtor.

Fourth: All claims having priority of payment pursuant to the provisions of Section 64 of the Bankruptcy Act in order of their priority.

Fifth: The amount necessary to be paid to creditors holding conditional sales contracts to pay off the amount of said contracts (the principal amount owing on such indebtedness is approximately $165,000.00).

Sixth: The surplus remaining, after payment of the foregoing and after retaining $1,000.00 as necessary operating capital, shall be used, 1st: To pay unsecured creditors the full amount of their claims allowed by the Court after such claims are filed herein. [7]

Such payments to such creditors shall be in the nature of pro rata dividends in accordance with the amounts of their claims, and monthly disbursements.

Seventh: After all of the foregoing debts, obligations and charges are paid, there shall be paid to the

Exhibit A—(Continued)

holders of participating royalty interests all accumulated credits due thereon by reason of nonpayment at the times specified in their contracts.

Eighth: Upon payment of all of such sums, the arrangement proceeding shall thereupon be terminated, and the corporation shall then be entitled to manage its affairs in such manner as it may elect, consonant with the laws of the State of California, and of the United States, and with any laws pertaining to its right to operate and to do business.

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE

Vice-President [8]

SUMMARY OF DEBTS AND ASSETS

(From the Statements of the Debtor in Schedules A and B)

		Dollars Cents
		None
Schedule A....1—a	Wages .....)	
Schedule A....1—b (1)	Taxes due United States ....)	
Schedule A....1—b (2)	Taxes due States .....)	3,516.11
Schedule A....1—b (3)	Taxes due counties, districts and municipalities)	
Schedule A....1—c (1)	Debts due any person, including the United States, having priority by laws of the United States	None
Schedule A....1—c (2)	Rent having priority	None
Schedule A....2	Secured claims	165,382.48
Schedule A....3	Unsecured claims	53,101.31
Schedule A....4	Notes and bills which ought to be paid by other parties thereto	None
Schedule A....5	Accommodation paper	None
	Schedule A, total	221,999.90
Schedule B....1	Real estate	145,000.00
Schedule B....2—a	Cash on hand	100.00
Schedule B....2—b	Negotiable and non-negotiable instruments and securities	N1,000.00
Schedule B....2—c	Stocks in trade	900.00
Schedule B....2—d	Household goods	None
Schedule B....2—e	Books, prints and pictures....	None
Schedule B....2—f	Horses, cows and other animals	None
Schedule B....2—g	Automobiles and other vehicles	None
Schedule B....2—h	Farming stock and implements	None
Schedule B....1—i	Shipping and shares in vessels	None

Summary of Debts and Assets—(Continued)

		Dollars	Cents
Schedule B....2—j	Machinery, fixtures, and tools Included in B—land	500.00	
Schedule B....2—k	Patents, copyrights, and trade-marks	None	
Schedule B....2—l	Other personal property	None	
Schedule B....3—a	Debts due on open accounts	None	
Schedule B....3—b	Policies of insurance	Nominal	
Schedule B....3—c	Unliquidated claims	None	
Schedule B....3—d	Deposits of money in banks and elsewhere	150.00	
Schedule B....4	Property in reversion, remainder, expectancy or trust, etc.	None	
Schedule B....5	Property claimed as exempt ($ None)		
Schedule B....6	Books, deeds and papers		
	Schedule B, total	147,650.00	

SOVEREIGN OIL CORPORATION,

J. R. McKINNIE, Petitioner. [9]

SCHEDULE A STATEMENT OF ALL DEBTS OF BANKRUPT

SCHEDULE A-1

Statement of all creditors of whom priority is secured by the act

A.—Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding $600 each, earned within three months before filing the petition.

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted—whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.			Amount due or Claimed Dollars Cents
[Illegible]	Payroll	None	None

B.—Taxes due and owing to—

(1) The United States

(2) The State of..... Unknown

(3) The county, district or municipality of—City of

El Segunda—license tax or fee.....

State of 100.00

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted—whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.	
Collector of Internal Revenue, Los Angeles, Calif. Soc. Sec. Tax	104.01
State of California, Unemployment Commission —2d, 3d, 4 ¼ 1941 and 1st ¼ of 1942.....	864.51
State of California—Mining Rights Tax.....	131.26
County of Los Angeles—Mining Rights Tax.....	918.89
County of Los Angeles—Personal property tax	1,082.44
Corporation Trust Co.—Reno, Nevada	200.00
Secretary of State of California—Resident Agent's fee	5.00
Division of Corporations—escrow fee	10.00

Schedule A-1—(Continued)

Amount due or Claimed Dollars Cents

C.—(1) Debts owning to any person, including the United States, who by the laws of the United States is entitled to priority.

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.

Bank of America—Seventh and Spring, Los Angeles, Calif. Registrar's fees 100.00

C.—(2) Rent owing to a landlord who is entitled to priority by the laws of the State of....., accrued within three months before filing the petition, for actual use and occupancy.

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.

None ..... None

Total..... 3,516.11

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-Pres.

Petitioner. [10]

SCHEDULE A-2

Creditors Holding Securities

B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several [Illegible] ors, and also particulars concerning each debt, as required by the Act of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—Description of Securities.—When and where debts were contracted, and nature and consideration thereof.—Whether claim is contingent, unliquidated or disputed.	Value of Securities Dollars Cents	Amount due or Claimed Dollars Cents
R. P. Cooney, 406 No. Citrus, Los Angeles, Calif. ..... (This creditor is secured in that he holds seller's interest in conditional sales contract covering sale of oil derrick to debtor—Original purchase price $1750.00-)		1,225.00
J. D. Bush, 5199 District Boulevard, Los Angeles, Cal. ..... (This creditor is secured in that he holds legal title to two oil derricks sold to debtor on conditional sales contract. Original purchase price $3400.00)		2,650.00
Naitonal Supply Co., Torrance, California ..... (This creditor is secured in that it is assignee of 53¼% of the gross production of oil and hydrocarbon substances producted from Community Well No. 1 in Block 31, El Segunda, Calif.; and is likewise secured in that it holds a chattel mortgage covering all boilers and drilling equipment of the debtor, and has legal title to 4 pumping units, 28000 2½" tubing, 28000 sucker rods, and miscellaneous fittings and connections sold to the debtor on conditional sales contract and holds 3% overriding royalty in Inca Oil well at Athens)		153,023.18

Schedule A-2—(Continued)

	Value of Securities Dollars Cents	Amount due or Claimed Dollars Cents
American Pipe & Steel Co., 230 Date Ave., Alhambra, California		8,484.30
(This creditor is secured in that it holds a chattel mortgage on 8 1500 bbl. 3 ring bolted tanks and 2 750 bbl. 3 ring bolted tanks, 4 oil and gas separators, 4 steel stairways)		
Total.....		165,382.48

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-Pres.
Petitioner [11]

SCHEDULE A-3

Creditors whose Claims are Unsecured

(N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—Names and resi- contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount due or Claimed Dollars Cents
Advance Truck Co., 21740 Alameda St., Long Beach, Calif.	14,338.09
Axelson Mfg. Co. 6160 So. Boyle, Vernon, Calif.	80.89
American Boiler Works, 2344 Orange, Long Beach, Calif.	392.80
Bank of America, Main Office, Long Beach, Calif.	100.00

Schedule A-3—(Continued)

	Amount due or Claimed Dollars Cents
Baash Ross Tool, 5512 Boyle Ave., Los Angeles, Calif.	739.83
Alexander Anderson, 2607 Pasadena Ave., Long Beach, Calif.	292.46
Blackwell & Sunde, 3135 Cherry Ave., Long Beach Calif.	1,683.02
Cyrus Bell, 714 W. Olympic Blvd., Los Angeles, Calif.	6,439.46
Calowell Construction Co., 1855 E. Wardlow Blvd., Long Beach, Calif.	2,386.70
Corporation Trust Co., New York City, N. Y.	200.00
Crail Brothers, 3333 Myrtle Ave., Long Beach, Calif.	3,174.23
J. H. Dastell, 3725 Subway Terminal Bldg., Los Angeles, Cal.	3,725.00
Gardiner Buol, First and Pine, Long Beach, Calif.	1,203.20
Geo. R. H. Goodner, Munsey Building, Washington, D. C.	125.00
Halliburton Cementing Co., 1709 W. 8th St., Los Angeles, Cal.	1,655.84
Hillman-Kelly, 2439 Hunter St., Los Angeles, Calif.	277.64
Imperial Corporation, 412 W. 6th St., Los Angeles, Calif.	81.54
Lane Wells, 5810 So. Soto, Vernon, Calif.	1,094.86
Lyons & Lyons, 639 So. Spring St., Los Angeles, Calif.	260.00
Modearis Supply Co., 8638 Otis Ave., Southgate, Calif.	135.02
MacClatchie Mfg. Co., 2120 No. Alameda, Compton, Cal.	168.02
Macco Construction Co., 815 No. Paramount Blvd., Clearwater, Calif.	814.21

Schedule A-3—(Continued)

	Amount due or Claimed Dollars Cents
Midway Fishing Tool Co., 2998 Cherry Ave., Long Beach, Calif.	658.45
Pico-Victoria, 4218 W. Pico, Los Angeles, Calif.	67.60
Pacific Perforating Co., 1103 Border Ave., Torrance, Cal.	54.66
Perkins Cementing Co., Petroleum Securities Bldg., Los Angeles, Calif.	3,952.35
Petroleum Rectifying Co., 1390 E. Brunett, Long Beach, Cal.	362.86
Petroleum Prod. Engineering, Long Beach, California	314.53
Ritchie & Co., 2609 Cherry Ave., Long Beach, Calif.	150.50
Schlumberger, Jergins Trust*n* Building, Long Beach, Calif.	1,438.01
Signal Oil & Gas Co., 811 W. 7th St., Los Angeles, Calif.	273.17
Mabel T. Smith, 490 Mark West Spring R., Santa Rosa, Calif.	754.20
Standard Oil Co., 805 W. Olympic Blvd., Los Angeles, Calif.	200.00
R. C. Smith, W. Compton Blvd., Compton, Calif.	2,754.46
Stationers Corp., 525 So. Spring St., Los Angeles, Calif.	125.87
State Compensation Insurance, State Bldg., Los Angeles, Cal.	76.47
Tretolite Co. of California, 5317 Anaheim-Telegraph Road, Los Angeles, Calif.	67.70
O. P. Yowell, 714 W. Olympic Blvd., Los Angeles, Calif.	392.28
W. O. Martin, 3900 Myrtle Ave., Long Beach, Calif.	1,810.39

Schedule A-3—(Continued)

	Amount due or Claimed Dollars Cents
M. Sanborn, c/o J. H. Dastell, 725 Subway Terminal Buildings, Los Angeles, Calif. (this person is assignee of J. H. Dasteel of the indebtedness owing by the debtor to said J. H. Dasteel)	
Park Central Building, 412 W. 6th St., Los Angeles, Calif.	280.00
Total	53,101.31

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-Pres.

.....Petitioner [12]

SCHEDULE A-4

Liabilities on Notes or Bills Discounted which ought to be Paid by the Drawers, Makers, Acceptors, or Indorsers

(N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, acceptors, or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars shall be stated as to notes or bills on which the debtor is liable as *i*ndorser.)

Reference to Ledger or Voucher.—Names of holders as far as known.—Residences (if unknown, that fact must be stated.)—Place where contracted.—Whether claim is disputed.—Nature and consideration of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount due or Claimed Dollars Cents
None	None
Total	None

SOVEREIGN OIL CORPORATION

By J. R. McKinnie, Debtor

Petitioner [13]

SCHEDULE A-5

Accommodation Paper

(N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as to other commercial paper.)

Reference to Ledger or Voucher.—Names of Holders.—Residences (If unknown, that fact must be stated).—When and and where dences of persons accommodated.—Place where contracted.—Whether claim is disputed.—Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount due or Claimed Dollars Cents
None	None
Total	None

SOVEREIGN OIL CORPORATION
By J. R. McKINNIE, V-Pres.
Petitioner

OATH TO SCHEDULE A

State of California
County of Los Angeles—ss.

I, J. R. McKinnie, Vice-President, the person whose name subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information and belief.

SOVEREIGN OIL CORPORATION
By J. R. McKINNIE, Petitioner
Vice-President

Subscribed and sworn to before me this 19 day of June, 1942.

[Seal] ADELE O. CARVER
(Official Character.)

Notary Public in and for the County of Los Angeles, State of California.

SCHEDULE B. STATEMENT OF ALL PROPERTY

SCHEDULE B-1

Real Estate

Location and Description of all Real Estate owned by Debtor, or held by him, whether under deed, lease or contract.—Incumbrances thereon, if any, and dates thereof.—Statement of particular relating thereto.	Estimated value of Debtor's Interest Dollars Cents
The debtor herein is the owner of the lessee's interest in and to a certain Oil and Gas Lease, executed on the 24th day of November, 1937, by and between F. R. C. Fenton and Dorothy S. Fenton, his wife, Ethelwyn Laurence, et al and the debtor covering real property situate in the County of Los Angeles, State of California, to-wit, Lots 1, 5, 6, 9, 10, 13, 14, 15, 16 and 17 and 18 in Block 31, of the Townsite of El Segundo, as per Map in Book 18, page 69 of the Maps, Los Angeles, County on which is situate Community Well No. 1 Value of said well, complete with derrick, tubing, pump, pump connections, pumping unit, tank and miscellaneous fittings and tools	65,000.00
The debtor herein is the owner of the Lessee's interest in and to a certain oil and gas lease, executed on or about the 14th day of April, 1938, by and between 18 lot owners and Elsie Oil Company, covering real property situate in the County of Los Angeles, State of California, to wit: Lots 1 to 18 both inclusive, Block 32 as per Sheet No. 1, El Segundo, recorded in Map Book 18, page 69, Records of Los Angeles County on which is situate Community Well No. 2 Value of said well, complete with derrick, tubing, pump, pump connections, pumping unit, tank and miscellaneous fittings and tools	30,000.00

Schedule B-1—(Continued)

Location and Description of all Real Estate owned by Debtor, or held by him, whether under deed, lease or contract.—Incumbrances thereon, if any, and dates thereof.—Statement of particulars relating thereto.	Estimated value of Debtor's Interest Dollars Cents
The debtor is the owner of the Lessee's interest in and to a certain oil and gas lease, executed on the 13th day of May, 1937, by and btween J. F. Copinger and Henry Reineman, et al covering real property situate in the County of Los Angeles, State of California, to-wit:	
Lots 11, 12, 13, 44, 45 and 46 of Block 123 of the City of El Segundo, County of Los Angeles, State of California, as per map recorded in Book 22, pages 106 and 107 of Maps, Records of Los Angeles County	
Value of said well, complete with derrick, pump, tubing, pump connections, pumping unit, tank and miscellaneous fittings and tools	20,000.00
The debtor is the owner of the Lessee's interest in and to a certain oil and gas lease, executed on or about May 23, 1938, by and between Elsie Oil Company and 73 property owners covering real property situate in the County of Los Angeles, State of California, to-wit:	

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-Pres.
Petitioner [15]

Lots 1 to 37 both inclusive and Lots 39 and 40, Tract 3012, recorded in Map Book 29, Page 39, Records of Los Angeles County; and Lots 1 to 33, both inclusive, Tract 2028, recorded in Map Book 35, page 37, records of Los Angeles County; and Lot 79, Block 123, as per sheet No. 8, El Segundo, recorded in Map Book 22, pages 106 107 Records of Los Angeles County

Schedule B-1—(Continued)

Location and Description of all Real Estate owned by Debtor, or held by him, whether under deed, lease or contract.—Incumbrances thereon, if any, and dates thereof.—Statement of particulars relating thereto.	Estimated value of Debtor's Interest Dollars Cents
Value of said well, complete with derrick, pump, tubing, pump connections, pumping unit, tank and miscellaneous fittings and tools	~~13,000.00~~ 30,000.00
Certain of the equipment on the foregoing leaseholds is incumbered as set forth in Schedule A-2 hereof	
	~~52,000.00~~
Total	145,000.00

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-Pres. [16]

SCHEDULE B-2

Personal Property

	Dollars Cents
A.—Cash on hand	100.00
B.—Negotiable and non-negotiable instruments and securities of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately.)	
3% overriding royalty interest in Inca Oil Company well at Athens, Calif. (Assigned as security as set forth in Schedule A-2 hereof)	1,000.00
C.—Stock in trade, in.....business of..... at,....., of the value of	
Approximately 1000 bbls. crude oil	900.00

Schedule B-2—(Continued)

	Dollars Cents
D.—Household goods and furniture, household stores, wearing apparel and ornaments of the person	
None	None
Total	2,000.00

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-President

Petitioner. [17]

E.—Books, primts and Pictures	
None	None
F.—Horses, Cows, Sheep and other animals (with number of each)	
None	None
G.—Automobiles and other Vehicles	
None	None
H.—Farming stock and Implements of Husbandry	
None	None
Total	None

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-President

Petitioner [18]

I.—Shipping and Shares in Vessels	
None	None

Schedule B-2—(Continued)

	Dollars Cents
J.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated	
1	
Includes in Schedule B-2 and incumbered as set forth in Schedule A-2 hereof	
Office furniture, consisting of desks, chairs, safe etc. in debtor's office in Park Central Building	500.00
K.—Patents, Copyrights, and Trade-Marks	
None	None
L.—Goods or personal property of any other description, with the place where each is situated	
None	None
Total	500.00

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-Pres.

Petitioner. [19]

SCHEDULE B-3

Choses in Action

	Dollars Cents
A.—Debts Due Petitioner on Open Account as per records of debtor from sale of sale of oil	
~~None~~	~~None~~
B.—Policies of Insurance	
Various policies of fire, public liability, compensation and other protective policies	~~Nominal~~
C.—Unliquidated Claims of every nature, with their estimated value.	
None	~~None~~

Schedule B-3—(Continued)

	Dollars	Cents
D.—Deposits of Money in Banking Institutions and Elsewhere.		
~~Bank of America~~		
Union Bank and Trust Co., 8th and Hill Sts., Los Angeles, Calif. ....Ap.	150.00	
Total.....	150.00	

SOEVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-President
Petitioner. [20]

SCHEDULE B-4

Property in reversion, remainder or expectancy, including property held in truct for the Debtor or subject to any power or right to dispose of or to charge.

(N. B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of crditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.)

General Interest	Particular Description	Estimated Value of Interest Dollars	Cents
Interest in Land			
None		None	
Personal Property			
None.....	None.....		
Property in Money, Stock, Shares, Bonds, Annuities, etc.			
None		None	
Rights and Powers, Legacies and Bequests			
Total.....			

Schedule B-4—(Continued)

Property heretofore conveyed for benefit of creditors.

Amount realized as proceeds of property conveyed

Portion of debtor's property conveyed by deed of assignment, or otherwise, for the benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor.

Attorney's Fees.

Sum or sums paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.

Grainger and Hunt, 830 H. W. Hellman Building, Los Angeles, Calif.
On account of costs..... 60.00

Total.....

SOVEREIGN OIL CORPORATION

J. R. McKINNIE, Petitioner [21]

SCHEDULE B-5

Property claimed as exempt from the operation of the act of Congress relating to bankruptcy

(N. B.—Each item of property must be stated, with its valuation and, if any portion of it is real estate, its location, description and present use.)

Valuation
Dollars Cents

Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption

None ..... None

Schedule B-5—(Continued)

	Valuation Dollars Cents
Property claimed to be exempt by State laws, with reference to the statute creating the exemption	
None	None
Total	

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-Pres.
Petitioner. [22]

SCHEDULE B-6

Books, Papers Deeds and Writings relating to Debtor's Business and Estate

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody, or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books	Dollars Cents
Ordinary books pertaining to business of debtor	
Deeds	
None	None
Papers	
Ordinary papers pertaining to business of debtor	

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE, Vice-Pres.
Petitioner

OATH TO SCHEDULE B

State of California
County of Los Angeles—ss.

I, J. R. McKinnie, Vice-President of, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the schedule is a statement of alll my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

J. R. McKINNIE, Petitioner

Subscribed and sworn to before me this 19 day of June, 1942.

(Seal) ADELE O. CARVER

Notary Public in and for county of Los Angeles, State of Calif.

(Official Character) [23]

EXHIBIT D

List of Executory Contracts

1. Oil and Gas Lease designated "El Segundo Block 31 Community Oil and Gas Lease", dated November 24, 1937, by and between F. R. C. Fenton and Dorothy S. Fenton, his wife, Ethelwyn Laurence, Edith L. Clark, Mary E. Arthur, Adele Dorothy Lauth, Edward L. Blincoe, Mary F. Hilder, Florence E. Ramsaur, William H. Ramsaur and Georgia H. Ramsaur, his wife, Anne E. Barrows, William A. Edwards and Sidney R. Edwards, his wife, Ivan S. Cummings and Sidney Margaret Cummings, his wife, and H. L. Welch, Lessors, and Sovereign Oil Corporation, Lessee, covering the following described property in Los Angeles County, California:

Lots 1, 5, 6, 9, 10, 13, 14, 15, 16, 17, and 18 in Block 31 of the Townsite of El Segundo, as per Map in Book 18, Page 69 of Maps, Los Angeles County Records.

2. Oil and Gas Lease dated the 13th day of May, 1937, by and between Henry Reineman and Frieda L. Reinemen, his wife, Joe F. Montgomery & Hester S. Montgomery, his wife, and Harry G. Kerr & Dolores M. Kerr, his wife, as Lessors, and J. F. Copinger, Lessee, assigned to Sovereign Oil Corporation by said J. F. Copinger on the 13th day of May, 1937, and covering the following described property located in Los Angeles County, California:

Lots 11, 12, 13, 44, 45 and 46 of Block 123 of the City of El Segundo, County of Los Angeles, State of California, as per map recorded in Book 22, Pages 106 and 107 of Maps, Records of Los Angeles County.

3. Oil and Gas Lease dated the 14th day of April, 1938, by and between 18 lot owners and Elsie Oil Company, Lessee, assigned to Sovereign Oil Corporation by said Elsie Oil Company on the 14th day of April, 1938, and covering the following described property located in Los Angeles County, California:

Lots 1 to 18 both inclusive, Block 32, as per Sheet No. 1, El Segundo, recorded in Map Book 18, Page 69, Records of Los Angeles County.

4. Oil and Gas Lease dated the 31st day of March, 1937, by and between C. E. Hoyt, et al, Lessors, and Elsie Oil Company, Lessee, assigned to Sovereign Oil Corporation on the 23rd day of May, 1938, and

covering the following described property located in Los Angeles County, California:

> Lots 1 to 37 both inclusive and Lots 39 and 40, Tract 3012, recorded in Map Book 29, Page 39, Records of Los Angeles County; and Lots 1 to 33 both inclusive, Tract 2028, recorded in Map Book 35, Page 37, Records of Los Angeles County and Lot 79, Block 123 as per Sheet No. 8, El Segundo, recorded in Map Book 22, Pages 106-107, Records of Los Angeles County.

5. Four separate Contracts between the debtor and the Standard Oil Company of California, each dated the 9th of January, 1942, covering sale by the debtor corporation and purchase by the said [24] Standard Oil Company of crude petroleum oil produced from wells located on each of the above described properties (Executory Contracts Nos. 1, 2, 3, and 4)

6. Assignments of participating royalty interests in the percentages as set forth in debtor's original petition herein. The holders of said participating royalty interests are not set forth herein because the royalties owing to them are subsequent to the unsecured creditors' rights herein.

SOVEREIGN OIL CORPORATION

By J. R. McKINNIE

Vice-President

State of California

County of Los Angeles—ss.

I, J. R. McKinnie, Vice-President of the person who subscribed to the foregoing statement of execu-

tory contracts, do make solemn oath that the matters therein contained are true and complete to the best of my knowledge, information and belief.

J. R. McKINNIE

Subscribed and sworn to before me this 19th day of June, 1942.

[Seal] ADELE O. CARVER

Notary Public in and for the County of Los Angeles, State of California [25]

EXHIBIT E

In the District Court of the United States for the Southern District of California, Central Division

No. .....

In the Matter of the Estate of

SOVEREIGN OIL CORPORATION, a Nevada Corporation

STATEMENT OF AFFAIRS

For Bankrupt or Debtor Engaged in Business

1. Nature, Location and Name or Business:

What business are you engaged in? Answer Producing Oil and other hydrocarbon substances

Have you ceased business and if so, when? Answer No

Where and under what name do you carry on such business? Answer Sovereign Oil Corporation, a Nevada corporation

When did you commence such business? Answer March 11, 1928

Where else, and under what other names, have you carried on business within the six years next before the filing of the original petition herein? Answer None

(Give street addresses, names of partners or associates, joint ventures, and the periods for which such business was carried on.)

2. Books and Records:

By whom, or under whose direction, have your books of account and records been kept during the two years next before the filing of original petition? Answer D. M. Smith

(Give names, address and length of time.)

By whom have your books of account and records been audited during the two years next before the filing of original petition? Answer Lyons & Lyons, Stock Exchange Building Los Angeles, Calif.

(Give names, addresses and dates of audits.)

In whose possession are your records and account books? Answer debtor

(Give names and addresses.)

3. Financial Statements:

Have you issued any financial statements within the two years immediately preceding the filing of original petition? Answer It may be that the debtor did issue financial statements upon request of stockholders or creditors, but affiant making the within statement does not know that it has.

(Give names, addresses and dates when issued, of the persons to whom issued, including agencies of all kinds.)

4. Inventories:

When was the last inventory of your property taken? Answer October 1941

By whom, or under whose direction, was this inventory taken? Answer California National Supply Company

What was the amount, in dollars, of the inventory? Answer Not priced

(Was inventory taken at cost, market, or otherwise.)

[26]

When was the next prior inventory of your property taken? Answer Not any taken

By whom, or under whose direction, was this inventory taken? Answer .....

What was the amount, in dollars, of this inventory? Answer .....

(Was inventory taken at cost, market, or otherwise.)

In whose possession are the records of the two inventories above referred to? Answer California National Supply Company has the estimate it took of the property of the debtor. An actual inventory was not taken, but merely an estimate of the debtor's holdings

(Give names and addresses.)

5. Income Other Than From Operation of Business:

What amount of income, other than from the opera-

tion of your business, have you received during each of the two next before the filing of original petition herein? Answer None
(Give particulars, as to source, and the amount received therefrom.)

6. Income Tax Returns:
Where did you file your last Federal and State income tax returns, and for what years? Answer 1942 for 1941—at Los Angeles

7. Bank Account and Safety Deposit Boxes:
What bank accounts have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceeding the filing of the original petition? Answer Union Bank and Trust Company—8th and Hill Sts., Los Angeles, Calif.
(Give the name and address of each bank, the name in which the deposit was maintained, and the name of every person authorized to make withdrawals from such account.)

What safe deposit box or boxes or other depository or depositories have you kept *of* used for your securities, cash or other valuables, within the two years next to the filing of the original petition herein? Answer None
(Give the name and address of the bank or other depository, of the name in which each box or other depository was kept, the name of every person who had the right to access thereto, a brief description of the contents thereof, and, if surrendered, when

surrendered, or, if transferred, when transferred and the name and address of transferred.)

8. Property Held in Trust:
What property do you hold in trust for any other person? Answer None
(Give name and address of each person, and a description of the property and the amount or value thereof.)

9. Prior Bankruptcy or Other Proceedings; Assignments for Benefit of Creditors:
What proceedings under the Bankruptcy act have been brought by or against you during the six years next before the filing of the original petition herein: Answer None
(Give the location of the Bankruptcy Court, the nature of the proceedings, and whether a discharge was granted or refused, or a composition, arrangement or plan was or was not confirmed.)

Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver or trustee? Answer None
(If so, give the name and location of the Court, the nature of the proceedings, a description of the property, and the name of the receiver or trustee.)

Have you made any assignment for the benefit of your creditors, or any general settlement with your creditors, within the two years next before the filing of the original petition herein? Answer None
(If so, give dates, the name of the assignee, and a brief statement of the terms of assignment or settlement.)

10. Loans Repaid:
What repayment of loans have you made during the year next immediately preceeding the filing of the original petition herein? Answer Yes — Debtor during January 1942 transferred to Oil Investors' Incorporation the interest of the debtor in three wells located at Wilmington, Calif., and said the proceeds from said well, to-wit, $12,500.00 were distributed among National Supply Co., American Pipe & Steel Co. and Callowell Construction Co., on account of accrued indebtedness of the debtor
(Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender [27] is a relative, the relationship. If the bankrupt or debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and, if so, the relationship. If the bankrupt or debtor is a corporation, state whether the lender is or was an officer, director or stockholder, or a relative of an officer, director or stockholder, and if so, state the relationship.)

11. Transfer of Property:
What property have you transferred or disposed of, other than in regular course of business, during the year immediately preceeding the filing of the original petition? Answer None, other than interest in three wells set forth under question 10 hereof
(Give a description of the property, the date of the transfer or disposition, or whom transferred or how

disposed, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

12. Accounts Receivable:
Have you assigned any of your accounts receivable during the year immediately preceeding the filing of the original petition herein? Answer None

(If so, give names and addresses or assignees.)

13. Losses:
Have you suffered any losses from fire, theft, or gambling during the years next before the filing of the original petition? Answer None

(If so, give particulars, including dates, and the amounts of money or value and general description of property lost.)

(If the Bankrupt or Debtor Is a Partnership or Corporation, the Following Additional Questions Should Be Answered.)

14. Withdrawals:
What personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, during the year immediately preceeding the filing of the original petition herein? Answer None, other than salaries as hereinafter noted
(Give the name of each person, whether a partner, officer, director or manager, the dates and amounts of withdrawals, and the nature or purpose thereof.)

15. Members or Partnership; Officers, Directors, Managers, and Principal Stockholders of Corporation:

What are the names and addresses of each member of the partnership, or the names, titles and addresses of each officer, director and managing executive, and of each stockholder holding 25 per cent or more of the issued and outstanding stock, of the corporation? Answer D. M. Smith, Santa Rosa, Calif. President, Salary Annual salary $2745.93; J. R. McKinnie, V-Pres. 4037 Ingraham Los Angeles Calif. Salary $2745.95 annually; Martha L. Taylor, Asst. Secty and Asst. Treas. Salary $1568.35.

Dated this 11 day of June, 1942.

SOVEREIGN OIL CORPORATION

Bankrupt Debtor

By J. R. McKINNIE

State of California
County of Los Angeles—ss

I, J. R. McKinnie, Vice-President of, the person who subscribed to the foregoing statement of affairs, do make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

J. R. McKINNIE

Bankrupt Debtor

Subscribed and sworn to before me this 19 day of June 1942

[Seal] ADELE O. CARVER

Notary Public

[Endorsed]: Filed June 19, 1942. [28]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE UNDER SECTION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on June 19, 1942 before the said Court the petition of Sovereign Oil Corporation, a corporation that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Hugh L. Dickson, Esq. one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Sovereign Oil Corporation, a corporation shall attend before said referee on June 26, 1942 and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Leon R. Yankwich Judge of said Court, and the seal thereof, at Los Angeles, in said District, on June 19, 1942

[Seal] EDMUND L. SMITH, Clerk
By E. M. ENSTROM, JR.
Deputy Clerk

[Endorsed]: Filed June 19, 1942. [29]

[Title of District Court and Cause.]

ORDER APPOINTING NEW RECEIVER

In this proceeding, commenced on June 19, 1942, under Chapter XI of the National Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, for an arrangement between the above named debtor corporation and its creditors, R. P. Cooney, upon application of the parties in interest, having been thereafter appointed and qualified on June 19, 1942, as Receiver of the debtor's estate, and having acted as such until November 7, 1942 and then resigned, and his resignation having then been accepted by the Court, and it appearing and the Court hereby finds that for the protection of the interests of all parties herein and the debtor's estate it is necessary that a new Receiver be forthwith appointed in the place and stead of the said R. P. Cooney, which said new Receiver shall operate the business and manage the property of the debtor until the further order of the Court, the said old Receiver having done likewise with the permission of the Court,

It Is Hereby Ordered that V. W. Erickson, of Los Angeles, California, be and he is hereby appointed as the new Receiver of the property and assets of the debtor, and

It Is Further Ordered that said new Receiver shall have the power to operate the business and manage the property of the debtor until further order of this Court, and the duties of said new Receiver are hereby specifically extended beyond those of a mere custodian within the meaning of

Section 48 of the Bankruptcy Act, to embrace the conduct of the business and management of the property of the debtor, the incurring of indebtedness, the protection of the [30] interests of the estate, and the power to prosecute or defend any pending suit or proceeding by or against the Debtor, or to commence and prosecute any suit or proceeding on behalf of the estate before any judicial, legislative or administrative tribunal in any jurisdiction, and said new Receiver shall act until further order of this Court.

It Is Further Ordered that during the operation of the business of the debtor and management of the property of the debtor, said new Receiver shall file*d* reports thereof with the Court at such time or times as the Court may hereinafter order.

It Is Further Ordered that before entering upon his duties as new Receiver, said new Receiver shall furnish a bond conditioned for the faithful performance of his duties, with a good and sufficient surety or sureties, in the sum of $10,000.00.

Dated this 7th day of November, 1942.

HUGH L. DICKSON
Referee in Bankruptcy

[Endorsed]: Filed Nov. 7, 1942 at 20 min. past 9 o'clock A.M. Hugh L. Dickson, Referee, C. M. Commins, Clerk, CMC.

[Endorsed]: Filed Sept. 16, 1943. Edmund L. Smith, Clerk by E. M. Enstrom, Jr., Deputy Clerk.

[31]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW OF ORDER FIXING STATUS OF CLAIMS OF LANDOWNERS' ROYALTIES FROM "EL SEGUNDO BLOCK 31 COMMUNITY OIL AND GAS LEASE."

I, Hugh L. Dickson, one of the Referees in Bankruptcy of the above entitled court for Los Angeles County, respectfully certify that the above entitled bankruptcy proceeding is pending before me under a general order of reference.

The Debtor had filed its original petition under Chapter XI of the Bankruptcy Act and proposed an arrangement with its creditors. This plan was presented at the first meeting of creditors held on the 14th day of July, 1942, and as it seemed feasible, I ordered that it be put in operation for a tentative period of three months. It succeeded fairly well and was continued after that period while the plan of reorganization was worked out. On or about the 9th day of December, 1942, the Debtor, and the Western Mesa Oil Corporation, (the latter a company that had been organized to take over the assets of the Debtor in consummation of the plan of reorganization) filed a revised plan of arrangement and gave due notice of a meeting of creditors to be held on the 17th day of December, 1942 to hear and confirm said plan. That part of the revised plan of arrangement which related to landowners' royalties was contained in the following paragraph:

"Landowners' royalties which carry with them the right of forfeiture of the oil and gas leases under which such royalties are payable and where such right of forfeiture has not, prior to the filing of the peti- [32] tion in bankruptcy, been waived either in writing or by the conduct of the parties, will be paid in full in the same manner as priority claims. Where, however, the facts disclose that prior to the filing of the proceedings hereunder by the debtor, the landowners, by writing or by their conduct, have legally waived the right of forfeiture as to any of the unpaid royalties, the same will be treated the same as those in the class of unsecured creditors. Should any controversy arise as to the proper status of such claims of holders of landowners' royalties, the same shall be determined by the above entitled Court in the above entitled proceeding upon hearing after notice."

The holders of claims for unpaid landowners' royalties from "El Segundo Block 31 Oil and Gas Lease" appeared by their Committee, Wm. H. Ramsaur and Alan A. McCray and by their attorney, H. L. Welch, and asserted that they had not, prior to the filing of the petition in bankruptcy, either in writing or by their conduct, waived their right of forfeiture contained in said lease, and the Western Mesa Oil Corporation appeared by its counsel, R. Dechter, and asserted that said landowners had waived their right of forfeiture. A controversy as to the proper status of the landowners' royalties

having thus arisen within the purview of the revised plan of arrangement, evidence was introduced on behalf of the claimants on the one part and on behalf of the Debtor's successor on the other part and the controversy was submitted to me for determination.

From the evidence introduced at said hearing and from the records and files of this proceeding I adduced the following facts:

STATEMENT OF FACTS

The assets of the Debtor consist of four producing oil wells, each located on a separate leasehold within the Townsite [33] of the City of El Segundo, California. The leasehold under consideration covers Block 31 in said city. The Lessors are the owners of town lots within said Block and by the terms of said lease they have agreed to divide among themselves the royalties to be derived therefrom in the proportions that the number of square feet contained in the lot owned by each bears to the total number of square feet contained in said Block 31. The Lessors are numerous and have elected a committee to manage their interests in said lease.

Prior to September 1, 1942 the Debtor filed a suit in interpleader in the Superior Court of Los Angeles County requiring said Lessors to interplead their claims to said royalties. After that date the Debtor withheld the monthly royalties. The committee of the Lessors was told by those in charge of the Debtor that bank cashier's checks were being purchased each month with the proceeds of the royalties as they accrued and that the cash-

ier's checks would be delivered to the committee immediately upon the final determination of said interpleader suit. The final judgment in said interpleader suit was filed and entered on the 11th day of June, 1942. On the 17th day of June, 1942 those in charge of the Debtor delivered to the committee, bank cashier's checks representing the royalties for each month prior to March 1, 1942, and stated that the Debtor had ample funds receivable within a few days from which the balance of said accrued royalties would be paid. On the 19th day of June, 1942 the Debtor filed this proceeding in bankruptcy. No notice of forfeiture of the lease for nonpayment of royalties was given by the Lessors to the Debtor. There was no written waiver of the right to declare a forfeiture. The claimants appeared by their committee and by their attorney at the first meeting of creditors and stated that they expected payment in full of accrued royalties and would not waive any of their rights but would participate in the plan of arrangement proposed by the Debtor if it did not involve a waiver of their rights. [34]

From the foregoing facts and the foregoing provisions of the Debtor's plan of arrangement I drew the following conclusions:

CONCLUSIONS OF LAW

I.

That said landowners' royalties carry with them the right of forfeiture of the said oil and gas leases under which said royalties are payable, and that

such right of forfeiture has not, prior to the filing of the petition in bankruptcy herein, been waived either in writing or by the conduct of the parties.

II.

That the proper status of the claims of said holders of landowners' royalties is that of priority claims.

III.

That said claims for landowners' royalties in the sum of $2512.76 should be paid in full in the same manner as priority claims.

QUESTION TO BE REVIEWED

The question to be reviewed by the District Court upon the petition for review of the El Segundo Oil Company and Western Mesa Oil Company is:

Did the landowners, who are the lessors in El Segundo Block 31 Community Oil and Gas Lease, either in writing or by their conduct, prior to the filing of the petition in bankruptcy, waive their right to declare a forfeiture of said lease?

There are appended hereto the following pleadings and exhibits:

1. Petition for Review of Referee's Order as to the Proper Status of Claims of Landowners' Royalties from "El Segundo Block 31 Community Oil and Gas Lease". [35]

2. Reporter's Transcript of Hearing on Order to Show Cause on Holders of Landowners' Royalties on December 17, 1942, at 10:00 A. M. and 2:00 P. M.

3. Petition for Determination of Rights and Status of Holders of Landowners' Royalties.

4. Findings of Fact and Conclusions of Law as to the Proper Status of Claims of Landowners' Royalties from "El Segundo Block 31 Community Oil and Gas Lease".

5. The Revised Plan of Arrangement.

6. Findings of Fact, Conclusions of Law, and Order Confirming Revised Plan of Arrangement.

7. The Proposed Amendments to Findings of Fact, proposed by Martin & Bowker on Sovereign wells Nos. 2 and 4, dated January 13, 1943.

8. The Amendment to Proposed Findings of Fact, Submitted by H. L. Welch on Behalf of Landowners of Well No. 1, otherwise described as El Segundo Block 31 Community Well, dated January 15, 1943.

9. Petition for Leave to Expend Funds for the Benefit of the Estate, dated July 7, 1942, filed by the receiver.

10. The Order to Show Cause directed to The National Supply Company, American Pipe and Steel Corporation, J. D. Rush and the Landowners of Wells Nos. 1, 2, 3 and 4.

11. The Affidavit of Mailing copies of the Order to Show Cause and the Petition.

12. The Order Granting Petition for Leave to Expend Funds for the Benefit of the Estate.

13. Receiver's Exhibits Nos. 1, 2 and 3.

14. Landowners Exhibit No. 1.

Dated: February 5, 1943.

HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Feb. 8, 1943. [36]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

I, Hugh L. Dickson, one of the Referees in Bankruptcy of the above entitled court for Los Angeles County, respectfully certify that the above entitled bankruptcy proceeding is pending before me under a general order of reference.

On December 17, 1942 a meeting of creditors of the Debtor was held before me to hear its revised plan of arrangement, to confirm said plan, and to determine the status of certain claims, among which were the claims of the respondents herein.

STATEMENT OF FACTS

The principal and practically the sole assets of the debtor corporation are four oil leaseholds within the Townsite of the City of El Segundo, California. The leaseholds under consideration cover certain wells described as Sovereign No. 2 and Sovereign No. 4 wells. The leases are community oil and gas royalties wherein the royalties derived from said wells are payable to a number of lessors.

The royalties payable by the debtor corporation under the terms of the leases are payable monthly. That the debtor corporation paid to the landowners

of said No. 2 and No. 4 wells by check, dated March 20, 1942 the oil royalties due for the month of December, 1941; that the debtor corporation failed to pay any further royalties to said land owners after said date and prior to the filing of debtors petition in bankruptcy. No notice of forfeiture of the lease for nonpayment of royalties was given by the lessors to the debtor corporation. There was no written waiver by the lessors of their right [37] to declare a forfeiture under the terms of said leases for nonpayment of royalties.

The revised plan of arrangement which was served on the lessors herein and which was confirmed by me provided among other things as follows:

> "Landowners' royalties which carry with them the right of forfeiture of the oil and gas leases under which such royalties are payable and where such right of forfeiture has not, prior to the filing of the petition in bankruptcy, been waived either in writing or by the conduct of the parties, will be paid in full in the same manner as priority claims. Where, however, the facts disclose that prior to the filing of the proceedings hereunder by the debtor, the landowners, by writing or by their conduct have legally waived the right of forfeiture as to any of the unpaid royalties, the same will be treated the same as those in the class of unsecured creditors. Should any controversy arise as to the proper status of such claims of holders of landowners' royalties the same shall be deter-

mined by the above entitled Court in the above entitled proceeding upon hearing after notice."

From the foregoing facts and the foregoing provisions of the Debtor's plan of arrangement I drew the following conclusions:

CONCLUSIONS OF LAW

I.

That said landowners' royalties carry with them the right of forfeiture of the said oil and gas leases under which said royalties are payable, and that such right of forfeiture has not, prior to the filing of the petition in bankruptcy herein, been waived either in writing or by the conduct of the parties.

II.

That the proper status of the claims of said holders of landowners' royalties is that of priority claims.

III.

That said claims for landowners' royalties in the sum of $1,398.20 on Sovereign Well No. 2 and $1,409.26 on Sovereign Well No. 4 should be paid in full in the same manner as priority claims. [38]

QUESTION TO BE REVIEWED

The question to be reviewed by the District Court upon the petition for review of the El Segundo Oil Company and Western Mesa Oil Corporation is:

Did the landowners who are the lessors in community gas and oil leases covering Sovereign No.

2 and Sovereign No. 4 wells, either in writing or by their conduct prior to the filing of the petition in bankruptcy waive their right to declare a forfeiture of said lease?

Dated February 5, 1943.

HUGH L. DICKSON,
Referee.

[Endorsed]: Filed Feb. 8, 1943. [39]

[Title of District Court and Cause.]

PETITION FOR DETERMINATION OF RIGHTS AND STATUS OF HOLDERS OF LANDOWNERS' ROYALTIES

The petition of the above named debtor corporation and of V. W. Erickson, the Receiver of the estate of said debtor corporation, and of Western Mesa Oil Corporation respectfully shows:

On June 19, 1942, the debtor filed in the above entitled Court in the above entitled proceeding, its original petition for an arrangement with its creditors, pursuant to the provisions of Chapter XI of the National Bankruptcy Act of 1898, as amended by the Chandler Act of 1938. Thereafter and on June 19, 1942, an order was made by the Judge approving the petition and referring further proceedings in the administration of the estate to Hugh L. Dickson, a Referee in Bankruptcy of this Court. Thereupon, and on June 21, 1942, R. P. Cooney was appointed and qualified by said Referee as Re-

ceiver of the debtor's estate. He acted as such until November 7, 1942, when he resigned and his resignation was accepted by the Referee. Thereupon, and on November 7, 1942, V. W. Erickson was appointed and qualified by the Referee as Receiver in the place and stead of R. P. Cooney, and is now acting as such.

On December 5, 1942, the debtor corporation filed herein for the consideration of creditors and the Court a revised plan of arrangement. The said plan will be presented to the Court for confirmation on December 17, 1942.

Western Mesa Oil Corporation, a corporation, is a party in interest herein in that, under such plan, it proposes to step into the shoes of the debtor corporation, at *lease* temporarily, and work out the plan.

The debtor is a Nevada corporation. It was engaged in the production and sale of oil and gas. It operated, under leases, four wells known as Sovereign Wells Nos. 1, 2, 3, and 4 in the El Segundo District in Los Angeles County. With the permission of the Court, the said Receivers during the bankruptcy have been carrying on the debtor's business.

At the time of the commencement of the bankruptcy certain royalties, known as landowners' royalties, had accumulated and were unpaid in favor of the lessors under said leases, commonly known as landowners, in a sum aggregating several thousand dollars. Under the provisions of this revised plan of arrangement, it is provided that these ac-

cumulative landowners' royalties shall be paid in full in cash, unless the facts disclosed that such landowners did by their conduct prior to bankruptcy waive any forfeiture rights they had under their leases to forfeit the same by reason of such nonpayment of landowners' royalties. It now appears that, prior to bankruptcy, the landowners, after breaches of the conditions of their leases covering the said wells, accepted royalties under said leases from the debtor corporation with the full knowledge of all the facts and [40] that they are precluded thereby from enforcing any right of forfeiture arising out of such nonpayment and are relegated to the status of general creditors herein with respect to such unpaid royalties (see Kern Sunset Oil Co. v. Good Roads Oil Co., 214 C. 435, 440).

In connection with the administration of the debtor's estate and the consummation of the said revised plan of arrangement, it is necessary that the status and rights of the holders of the said unpaid landowners' royalties be determined by this Court. All current landowners' royalties under the said leases, arising since the commencement of this bankruptcy proceeding, have been paid.

A list of the holders of said landowners' royalties is hereto attached as "Exhibit A" and made a part hereof.

Wherefore, the petitioners pray that a time and place be fixed by the Court for a hearing of this petition; that an order issue herein directing the said holders of the said landowners' royalties to

appear before the Court at such time and place for the determination of their rights and status; that upon such hearing an order be made in conformity herewith and the facts developed; for general relief; and for the costs of this proceeding.

Dated this 9th day of December, 1942.

GRAINGER & HUNT.
By REUBEN G. HUNT,
Attorneys for Debtor and for V. W. Erickson, Receiver.

RAPHAEL DECHTER.
By HARRY PINES,
Attorney for Western Mesa Oil Corporation. [41]

EXHIBIT A

Well # 1

The landowners involved here have a committee which they have appointed and which acts for them. The names and addresses of this committee are as follows:

A. A. McCray	8306 Wilshire Blvd., Beverly Hills, Calif.
F. R. C. Fenton	1735 S. Harvard Blvd., Los Angeles, Calif.
Wm. H. Ramsaur	425 S. Mayo, Compton, Calif.

Well #2 *See Exhibit A—page 3 for detailed list.

There are a large number of landowners involved in connection with Well #2. The practice of the debtor corporation has been to send a check for the percents of these particular landowners to the Bank of America, Inglewood Branch, Los Angeles County. This bank has a list of the names and addresses of such landowners and acts for them in this respect.

Bank of America	Inglewood Branch, Inglewood, California

(Exhibit A—(Continued)

Well #3

J. F. Copinger	501 So. Wilton Pl., Los Angeles, Calif.
Mr. and Mrs. Henry Reineman	7719 Norton, Los Angeles, Calif.
Mr. & Mrs. Milton B. Newman	710 Longwood, Los Angeles, Calif.
Frank Cribbs	4918 Tenth Ave., Los Angeles, Calif.
Mrs. Maude C. Gallup	1127 Toro St., San Louis Obispo, Calif.
Mr. & Mrs. Harry G. Kerr	1215 - 251st St., Harbor City, Calif.
Mr. & Mrs. Victor Loraux	4338 Live Oak St., Bell, California
Mr. & Mrs. Frederick Wesson	3865 Victoria, Los Angeles, Calif.
First Universalist Parish	300 So. Los Robles, Pasadena, Calif.
Mr. & Mrs. William Eden	Rte. 3, Box 134, Fort Scott, Kansas
Mrs. Frances Peele Beebe	92 Lincoln Rd., Brooklyn, N. Y.
Mr. & Mrs. Harry E. Ness	81 No. Craig Ave., Pasadena, Calif.
Mrs. Margaret J. Moore	5305 Sunset, Los Angeles, Calif.
Mr. & Mrs. Joe F. Montgomery	221 Concord Ave., El Segundo, Calif.
Miss Irma M. Schoepflin	391 So. Parkwood Ave., Pasadena, Calif.
William R. Sax)	
Joseph Little Kittinger)	c/o Irma M. Shoepflin
Paul H. Schoepflin)	391 So. Parkwood Ave., Pasadena, Calif.
Florence Sax Bushnell)	

(Exhibit A—(Continued)

Well #4

Hazel J. Forhan	967 East Broadway, Long Beach, Calif.
Margaret M. Gatter	6505-D Gentry St., Huntington Park, Calif.
Abe Lowenstine & Mandel Lowenstine, Executors of the Estate of J. Lowenstine,	Valparaiso, Indiana
Mrs. Amelia R. Jones	2033 Genesee St., Utica, New York
S. Beck and Jessie Beck	571 So. Coronado, Los Angeles, Calif.
Ella S. Matthews	c/o Liberty Bldg. & Loan Ass'n 2512 So. Central Ave., Los Angeles, Cal.
Harold D. Dale and Hazel W. Dale	124 Eighth St., Manhattan Beach, Calif.
Mrs. Rollo H. Frank, et al,	R. R. No. 1, Box 854, Arlington, Calif.
William P. Maurer	P. O. Box 872, Hermosa Beach, Calif.
Margaret B. Hanna, Mae D. Lewis & Nina R. Bowker	201 Grand Ave., El Segundo, Calif.
J. F. Hamm & Kate Hamm	511 So. Palm, Alhambra, Calif.

[42]

(Exhibit A—(Continued)

Well #4—(Continued.)	
Clarence C. Hiatt	314 Haviland Ave., Whittier, Calif.
Adelaid D. Mosher	1726 Anapuni St., Honolulu, Hawaii
Floyd E. Atchison	200 W. Seventh St., San Pedro, Calif.
Edlou Company	6381 Hollywood Blvd., Los Angeles, Calif.
L. D. Johnson and Ethyl Johnson	1346 Ethel St., Glendale, Calif.
Susie N. Hardy	605 So. Normandie, Los Angeles, Calif.
Margaret Bell Hanna and Mae D. Lewis	201 Grand Ave., El Segundo, Calif.
Ethel Packard Cattern, Executrix of Estate of Charles Cattern	1703 W. Sixty-fifth St., Los Angeles, Calif.
Louis A. Deutsch	1605 Sunset Blvd., Los Angeles, Calif.
Henry M. Deutsch & Edna E. Deutsch	2632 W. Sixteenth Place, Los Angeles, Calif.
Katherine H. Griffith	c/o Mrs. W. B. Hamilton, Keystone Apts., 1369 Hyde St., San Francisco, Calif.

(Exhibit A—(Continued)

Well #4—(Continued.)

Melvina C. Hollingsworth	c/o R. R. Lawes, 721 Sixteenth St., Santa Monica, Calif.
Orland A. Hillman and Roma H. Hillman	Box 130 Melrose Rte, Roseberg, Oregon
Paul Gellor	1001 Burnside, Los Angeles, Calif.
Charles J. Soyster and Evelyn S. Soyster	6700 Lime Ave., Long Beach, Calif.
Leah W. Hill and Clarence S. Hill	3848 Valley Brink Rd., Los Angeles, Calif.
George L. Nelson & Irene M. Nelson	2629 Manhattan Ave., Hermosa, Calif.
Curtis Y. Kimball	1200 Esplanade, Redondo Beach, Calif.
Nellie M. Yarnell and Ellis T. Yarnell	1200 Esplanade, Redondo Beach, Calif.
Katherine Yarnell	1200 Esplande, Redondo Beach, Calif.
Ella W. Gifford	410 Newport Ave., Long Beach, Calif.
Mrs. Ruth Walker Wright	714 So. G. Street, Tacoma, Washington
Dorothy Blain	825 Benton Ave., Springfield, Missouri

(Exhibit A—(Continued)

Well #4—(Continued.)

Joseph R. Marquette, Jr., Administrator of the Estate of Joseph R. Marquette, Jr. deceased	1222 No. Normandie, Los Angeles, Calif.
Walter B. Kramer & Elysabeth Gile Kramer	2424 No. Washington Ave., Scranton, Pa.
Madeline Marino	619 Marina Blvd., San Francisco, Calif.
H. T. Harper	c/o G. C. Maile, 756 Fourth ~~St.~~ Ave San Francisco, Calif.
George P. Beebe and Frances P. Beebe	92 Lincoln Road, Brooklyn, New York
Lela B. Moss	127 W. 111 St., Los Angeles, Calif.
George L. Nelson and Irene M. Nelson	2629 Manhattan Ave., Hermosa Beach, Calif.
Adaline K. Eastham	4655 Beacon St., Chicago, Illinois
Lora Cann	455 No. Rowan Ave., Los Angeles, Calif.
Elizabeth Doddy Cummings	P. O. Box 262, Station S., Los Angeles, Calif.

(Exhibit A—(Continued)

Well #4—(Continued.)	
Rose K. Flaire	2925 Pasadena Ave., Los Angeles, Calif.
William B. Newby	215 No. Maryland Ave., Glendale, Calif. [43]
Peter Zurcher	604 Rock City St., Little Valley, N. Y.
William P. Maurer	P. O. Box 872, Hermosa Beach, Calif.
Ernest F. Wilson and Jennie June Wilson	2829 Leland Ave., Whittier, Calif.
Florence N. Wilson	1007 No. La Jolla Ave., Hollywood, Calif.
Sena C. Huse and Peter L. Huse (Sena C Huse-deceased)	see new address ~~5357 Virginia,~~ Los Angeles, Calif.
Peter L. Huse	Old address 5357 Virginia Ave. New Address 716 N. Irving Blvd.,
Sena C. Huse Deceased	P. L. Huse
Stephen Pelletier	1620 West Pico Blvd., Los Angeles, Calif.
George L. Nelson and Irene M. Nelson	2629 Manhattan Ave., Hermosa Beach, Calif.
C. E. Hoyt and Helen Gertrude Hoyt	c/o American Foundrymen's Association Inc.,

(Exhibit A—(Continued)

Well #4—(Continued.)

	222 W. Adams St., Chicago, Ill.
Clyde H. Baty and Mildred V. Baty	427 So. Figueroa St., Los Angeles, Calif.
Henry Van der Borg and Catherina Van der Borg	4216 Denker Ave., Los Angeles, Calif.

* Well #2

Edlou Company	8306 Wilshire Blvd., Beverly Hills
Frances Palmer Howe	1026 South Lucerne, Los Angeles
Ethel Mae Marcher & Frank A. Marcher	902 South Citrus, Los Angeles
LeRoy Pinson & Grace Gage Pinson	RFD #2, Live Oak, California
Charles William Heinen & Eve F. Heinen	Box 1448, Arcade Annex, Los Angeles
Ida Elsie Maberry	Route 2, Parma, Idaho
Otto N. Appel & Helen Appel	4610 Halldale Avenue, Los Angeles

(Exhibit A—(Continued)

Well #2—(Continued.)

O'Rell D. DeLude	82 South Santa Anita, Pasadena
Harold H. Hecox & Mary G. Hecox	8314 S. Figueroa, Los Angeles
Eugene O. Menz & Mamie Menz	305 South Elm Drive, Beverly Hills, Calif.
Mrs. Olive G. Love	715 No. Reese Pl., Burbank, Calif.
Emily W. Dennis & Alfred E. Dennis	515 South Alexandria, Los Angeles
Lyle Wimmer Olivera & Joseph A. Olivera	1635 Camden Avenue, West Los Angeles
Robert S. Wimmer, Adm. of Estate of Elizabeth A. Wimmer, Decd.	241 S. Serrano Avenue, Los Angeles
Mary B. Campbell	3235 South Cordova Street, Alhambra
Ida L. Wilson	Box 33, Huntington, West Virginia
Louis B. Wilson	2119 Stanley Hills Drive, Los Angeles
Julia B. Boette, Henry O. Boette, and Dorothy Jane Boette	812 Ritter Park, Huntington, West Virginia
John Watson	Electra Palace, Parkgage, Nr. Rotherham Yorkshire, England

(Exhibit A—(Continued)

Well #2—(Continued.)	
William E. Hullinger and Evelyn H. Hullinger	5332 Harcourt Avenue, Los Angeles
Harold Burns & Grace Mae Burns	703 E. El Segundo Blvd., El Segundo, Calif.
El Segundo Land & Improvement Co.	8306 Wilshire Blvd., Beverly Hills, Calif.
Edison Securities Company	Edison Building, Los Angeles
Winthrop Stark Davis & Tessa Marrin Davis	943 Lincoln Blvd., Santa Monica
Eugene V. Griffes & Kate S. Griffes	P. O. Box 1423, Palm Springs, Calif. [44]
Omo J. McClary & Wells F. McClary	324 Maryland Street, El Segundo
J. F. Anson & Teresa Anson	6381 Hollywood Blvd., Los Angeles, Calif.
Orris Hardacre & Ada Hardacre	1953 Camden Avenue, West Los Angeles
Frank G. Kline & May M. Kline	4813 Ninth Avenue, Los Angeles
Fred K. Cairns & Violet L. Cairns	3015 Hyperion, Los Angeles
Charles Diffenbaugh & Grace B. Diffenbaugh	508 North Ardmore, Los Angeles

(Exhibit A—(Continued)

Well #2—(Continued.)	
Sara L. Feddersen	913 E. Grand Avenue, El Segundo
Ellis L. Zemansky	c/o Mrs. Katz, 10760 Lindbrook Dr. W.L.A.
Florence Katz & Zundel Katz	10760 Lindbrook Dr., W.L.A.
C. E. Noble	1833 Canyon Drive, L. A.
J. H. Williams & Jennie Williams	400 H. W. Hellman Bldg., 354 S. Spring, L.A.
Ray E. Dockstader	Oxnard, California
Ruth Dorothy Johnson	1919 Taft Avenue, Hollywood
Rachel E. Carnahan	1741 Garfield Place, Hollywood
El Segundo Investment Co.	c/o Victor D. McCarthy, El Segundo, Calif.
Donald B. Keyes & Jeanette H. Keyes	2428 Canyon Drive, Los Angeles
Henrietta H. Hanna	1634 S. Hayworth Avenue, L. A.
Mary E. Laidlaw & Frances L. Tarr	1035 North La Jolla Ave., L. A.
Mary E. Laidlaw	1035 North La Jolla Ave., L. A.
Henry C. Hanna, Jr. and Elinore Lacy Hanna	3161 Walnut, Riverside, Calif.

(Exhibit A—(Continued)

Well #2—(Continued.)	
Guy H. Curtis, Jr. and Margaret Hanna Curtis	536 Twin Palms, San Gabriel, Calif.
Hector M. Dyer & Elizabeth Hanna Dyer	853 Lois Lane, Fullerton, Calif.
Dr. L. P. Clarke	7906 Santa Monica Blvd., West Hollywood
Angus A. Wallace	425 W. 4th Street, Los Angeles
Elsie Wilke	2650 N. Sawyer Avenue, Chicago, Ill.
Thomas F. Henson	1826 Massachusetts Avenue, N.W., Washington, D. C.

(Verified)

[Endorsed]: Filed Dec. 10, 1942 at 40 min. past 9 o'clock AM Hugh L. Dickson, Referee C. M. Commins, Clerk Br.

[Endorsed]: Filed Feb. 8, 1943 at ..... min past 5 o'clock PM Edmund L. Smith, Clerk By E. M. Enstrom, Jr., Deputy. [45]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon consideration of the petition filed herein by the above named debtor corporation, V. W. Erickson, the Receiver of the estate of the above named debtor corporation, and Western Mesa Oil Corporation, a corporation, for the determination of the rights and status of the holders of unpaid landowners' royalties,

It Is Hereby Ordered that the said holders of such landowners' royalties be and they are hereby required to appear before the undersigned Referee in Bankruptcy, at his Courtroom at 343 Federal Building, Temple and Spring Streets, Los Angeles, California, on Thursday, December 17, 1942, at 10 A. M., then and there to show cause why the said petition should not be granted and the rights and status of such holders be fixed and determined by the Court.

It Is Hereby Further Ordered that service of such petition and this order shall be sufficient if made by mail at Los Angeles on or before Friday, December 11, 1942.

Dated this 10th day of December, 1942.

HUGH L. DICKSON
Referee in Bankruptcy

[Endorsed]: Filed Dec. 10, 1942 at 40 min past 9 o'clock A.M. Hugh L. Dickson, Referee, C. M. Commins, Clerk BR.

[Endorsed]: Filed Sep. 16, 1943 Edmund L. Smith, Clerk By E. M. Enstrom, Jr., Deputy Clerk.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO THE PROPER STATUS OF CLAIMS OF LANDOWNERS' ROYALTIES FROM SOVEREIGN NUMBER 2 and NUMBER 4 WELLS IN THE EL SEGUNDO DISTRICT IN THE COUNTY OF LOS ANGELES

The debtor herein having filed its revised plan of arrangement wherein it is, among other things provided as follows:

> "Landowners' royalties which carry with them the right of forfeiture of the oil and gas leases under which such royalties are payable and where such right of forfeiture has not, prior to the filing of the petition in bankruptcy, been waived either in writing or by the conduct of the parties, will be paid in full in the same manner as priority claims. Where, however, the facts disclose that prior to the filing of the proceedings hereunder by the debtor, the landowners, by writing or by their conduct, have legally waived the right of forfeiture as to any of the unpaid royalties, the same will be treated the same as those in the class of unsecured creditors. Should any controversy arise as to the proper status of such claims of holders of landowners' royalties, the same shall be determined by the above entitled Court in the above entitled proceeding upon hearing after notice."

A petition was filed by the Debtor and by the Western Mesa Oil Corporation for the determination of rights and status of holders of landowners' royalties, and after due notice said proceeding came regularly on for hearing on the 17th day of December, 1942 before [47] the Honorable Hugh M. Dickson, Referee in Bankruptcy, at his Court room in the Federal Building, Los Angeles, California. The holders of claims for unpaid royalties in Sovereign Wells number 2 and number 4 appearing by their attorneys, Martin and Bowker and the debtor appearing by its counsel, Grainger & Hunt and the Western Mesa Oil Corporation appearing by its counsel, R. Dechter, and the Court having heard the testimony and having examined the proof offered by the respective parties and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes findings of fact and conclusions of law as follows:

FINDINGS OF FACT

The Court finds:

I.

That pursuant to the terms of the Lease under which the debtor corporation operates Sovereign number 2 and Sovereign number 4 wells, the landowners' royalties are payable monthly; that the landowners' have a right of forfeiture for non payment of royalties when due; that the debtor corporation paid to the landowners' of number 2 and number 4 Sovereign wells, by check dated March

20, 1942, royalties due for the month of December, 1941; that the debtor corporation failed to pay any royalties to said landowners' after said date and prior to the filing of debtors petition in bankruptcy; the receiver for said debtor corporation has paid current royalties on said wells to the landowners as the same became due.

II.

That the landowners' did not, prior to the filing of the petition in bankruptcy, in writing or by their conduct, waive their right of forfeiture as to any of the unpaid royalties; that by accepting the check dated March 20, 1942, for royalties for the month of December, 1941, said landowners' were not precluded thereby from [48] enforcing any right of forfeiture prior to the filing of the petition in bankruptcy by the debtor corporation.

III.

That there are landowners' royalties accrued and unpaid for the months of January, February, March, April, May, and that part of June from the 1st to the 19th inclusively, in the total sum of Thirteen Hundred ninety-eight Dollars and twenty cents ($1,398.20), on the number 2 Sovereign Well and the sum of Fourteen Hundred Nine Dollars and twenty-six cents ($1,409.25) on the number 4 Sovereign Well; that said amounts include the over riding royalties due the successors in interest of the Elsie Oil Company, to-wit: A. A. McCray, M. C. McCray, Britt L. Bowker and Ruth Dyer Cornell.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

I.

That said landowners' royalties carry with them the right of forfeiture to the oil and gas leases under which said royalties are payable, and that said right of forfeiture has not, prior to the filing of the petition in bankruptcy herein, been waived either in writing or by the conduct of the landowners'.

II.

That the proper status of the claims of said holders of landowners' royalties is that of priority claims.

III.

That the claims for landowners' royalties in the sum of Thirteen Hundred ninety-eight Dollars and twenty cents ($1,398.20) on Sovereign number 2 Well, and Fourteen Hundred nine Dollars and twenty-six cents ($1,409.26) on Sovereign number 4 well should be [49] paid in full in the same manner as priority claims.

Dated this 20th day of January, 1943.

HUGH L. DICKSON
Referee in Bankruptcy.

Approved as to form as provided in Rule 44.
GRAINGER & HUNT
By .....
Attorneys for Debtor

[Endorsed]: Filed Jan 20, 1943 at ..... min past 9 o'clock AM Hugh L. Dickson, Referee C. M. Commins, Clerk BR.

[Endorsed]: Filed Sep. 16, 1943 Edmund L. Smith, Clerk By E. M. Enstrom, Jr., Deputy Clerk.
[50]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO THE PROPER STATUS OF CLAIMS OF LANDOWNERS' ROYALTIES FROM "EL SEGUNDO BLOCK 31 COMMUNITY OIL AND GAS LEASE"

The debtor herein having filed its revised plan of arrangement wherein it is, among other things, provided as follows:

> "Landowners' royalties which carry with them the right of forfeiture of the oil and gas leases under which such royalties are payable and where such right of forfeiture has not, prior to the filing of the petition in bankruptcy, been waived either in writing or by the conduct of the parties, will be paid in full in the same manner as priority claims. Where, however, the facts disclose that prior to the filing of the proceedings hereunder by the debtor,

> the landowners, by writing or by their conduct, have legally waived the right of forfeiture as to any of the unpaid royalties, the same will be treated the same as those in the class of unsecured creditors. Should any controversy arise as to the proper status of such claims of holders of landowners' royalties, the same shall be determined by the above entitled Court in the above entitled proceeding upon hearing after notice."

a meeting of creditors after due notice was held before the Honorable Hugh M. Dickson, Referee in Bankruptcy, at his court room in the Federal Building, Los Angeles, California, on the 17th day of December, 1942, to hear said revised plan of arrangement. The holders of claims for unpaid landowners' royalties in El Segundo Block 31 Community Well appearing by a majority of their committee, to-wit, Wm. H. Ramsaur and Allan A. McCray, by their attorney, H. L. Welch, and asserting that they had not, prior to the filing of the petition in bankruptcy, either in writing or by their conduct, waived their rights of forfeiture of said leases, and the Debtor appearing by its counsel, Grainger & Hunt, and the Western Mesa Oil Corporation, appearing by its counsel, R. Dechter, and asserting that said land- [51] owners had waived their right of forfeiture, and a controversy having thus arisen as to the proper status of such claims of said holders of landowners' royalties, documentary and oral evidence was introduced on behalf of said landowners on the one part and on behalf of the Debtor on the

other part, and the case being closed and submitted for decision, the Court now makes and files its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

The Court finds:

I.

That under the terms of the lease under consideration landowners' royalties are payable monthly and the owners have a right of forfeiture for nonpayment; that monthly royalties were not paid by the Debtor to the claimants after September 1st, 1941, but then and thereafter there was pending in the Superior Court of Los Angeles County an interpleader suit brought by the Debtor requiring the claimants to interplead their claims to said royalties; that at all times during the pendency of said interpleader suit the claimants were told by those in charge of the Debtor that bank cashier's checks were being purchased each month with the proceeds of the royalties as they accrued and that said cashier's checks would be delivered to claimants immediately upon the final determination of said interpleader suit. That on the 17th day of June, 1942 immediately after the final determination of said interpleader suit the claimants demanded delivery of said cashier's checks; that at said time those in charge of the Debtor delivered cashier's checks for all royalties accruing prior to March 1, 1942 and stated that the Debtor had ample funds receivable within a few days from which the balance of said accrued royalties would be paid. That

immediately thereafter the Debtor filed this proceeding in bankruptcy. [52]

II.

That the landowners did not, prior to the filing of the petition in bankruptcy, in writing waive their right of forfeiture as to any of the unpaid royalties; on the contrary the Court finds that said landowners at the time of the delivery to them of the cashier's checks above mentioned specified in writing that said checks were received as payment of royalties for the months in which they accrued, that is to say, for the months prior to March 1, 1942.

III.

That there are landowners' royalties accrued and unpaid for the months of March, April, May and that part of June from the 1st to the 19th inclusive, in the total sum of $2512.76.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

I.

That said landowners' royalties carry with them the right of forfeiture of the said oil and gas leases under which said royalties are payable, and that such right of forfeiture has not, prior to the filing of the petition in bankruptcy herein, been waived either in writing or by the conduct of the parties.

II.

That the proper status of the claims of said holders of landowners' royalties is that of priority claims.

III.

That said claims for landowners' royalties in the sum [53] of $2512.76 should be paid in full in the same manner as priority claims.

Dated this 20th day of January.

HUGH L. DICKSON
Referee in Bankruptcy.

Approved as to form as provided in Rule 44.

GRAINGER & HUNT

By .....
Attorneys for Debtor.

[Endorsed]: Filed Jan 20, 1943 at ..... min past 9 o'clock AM Hugh L. Dickson, Referee C. M. Commins, Clerk BR.

[Endorsed]: Filed Feb 8, 1943 at ..... min past 5 o'clock PM Edmund L. Smith, Clerk By E. M. Enstrom, Jr., Deputy. [54]

[Title of District Court and Cause.]

REVISED PLAN OF ARRANGEMENT

The above named debtor corporation offers herein a revised plan of arrangement, as follows:

I. PRELIMINARY STATEMENT

The debtor is a Nevada corporation. It was engaged in the production and sale of oil and gas. It operated, under leases, four wells, known as Sovereign Wells Nos. 1, 2, 3 and 4, in the El Segundo District in Los Angeles County. During the course of its business, it issued to the public participating per cents in the gross production of its wells. It became involved financially, owing debts to secured and unsecured creditors, taxing units, landowners for royalties under leases, and holders of participating per cents. The debtor is insolvent not only because it is unable to pay its debts in the ordinary course of business as they mature, but also because its assets, at a fair valuation, are insufficient to pay its debts. Hence the bankruptcy.

II. HISTORY OF THE BANKRUPTCY

On June 19, 1942, the debtor filed in the above entitled Court in the above entitled proceeding, its original petition for an arrangement with its creditors, pursuant to the provisions of Chapter XI of the National Bankruptcy Act of 1898, as amended by the Chandler Act of 1938. Thereafter and on June 19, 1942, an order was made by the

Judge approving the petition and referring further proceedings in the administration of the estate to Hugh L. Dickson, a Referee in Bankruptcy of this Court. Thereupon, and on June 21, 1942, R. P. Cooney was appointed and qualified by said Referee as Receiver of the debtor's estate. He acted as such until November 7, 1942, when he resigned and his resignation was accepted by the Referee. Thereupon, and on November 7, 1942, V. W. Erickson was appointed and qualified by the Referee as Receiver in the place and stead of R. P. Cooney, and is now acting as such.

With the permission of the Referee, the Receivers have operated the business of the debtor. In such operation they have been able materially to cut down the cost of operation and to make substantial payments in reduction of the amounts due to secured creditors and the landowners from whom the leases were received. Current expenses of administration have been paid. No payments have been made upon claims arising prior to, and in existence at the time of, the commencement of [55] bankruptcy; nor have any payments been made to participating per cent holders. All prior labor debts were paid before bankruptcy.

Litigation is now pending between the Receiver and the National Supply Co. over the amount of its claim against the debtor's estate, secured and unsecured, and between the Receiver and the holders of participating per cents as to whether their rights are on a par with, or superior to, those of unsecured creditors, or are subordinate to the pay-

ment of unsecured claims. See In re Lathrap (C. C.A. 9), 61F. (2d) 37, 22 A.B.R. (NS) 136. If this revised plan is accepted by the creditors and confirmed by the Court, the claim of the National Supply Co. will be definitely established at the sum of $175,117.54 as of Sept. 30, 1942. This sum is secured by an assignment of an oil and gas lease embracing the premises on which is situate the El Segundo No. 1 Well, together with said well and the production therefrom, and is further secured by miscellaneous conditional sales contracts, and a chattel mortgage on equipment, all as more fully set forth in the claim of the National Supply Co. on file herein. The rights of per cent holders will be governed by the provisions of this plan if a majority in number and amount of participating per cent holders consent thereto; otherwise, the new corporation, to which it is proposed herein the assets of the debtor will be transferred, will agree to accept such assets subject to the rights of said per cent holders as determined by the above entitled Court upon hearing after notice.

III. PURPOSES OF THE REVISED PLAN

The Receivers have demonstrated that, for the present at least, the wells can be operated at an operating profit and that it is feasible to work out a plan of arrangement.

The plan here proposed will provide a method whereby, under the jurisdiction and supervision of the above entitled Court in this case, the unsecured claims will be satisfied and discharged, taxes and

expenses of administration will be paid in cash, holders of landowners' royalties will be paid as the Court directs, and current payments will be made to the holders of secured claims.

IV. CLASSES OF CREDITORS AND OTHER INTERESTED PARTIES

There shall be the following classes of creditors and other interested parties:

1. Secured creditors, holding conditional sales contracts, chattel mortgages, etc.
2. Tax units holding claims entitled to priority of payment.
3. Unsecured creditors.
4. Holders of landowners' royalties.
5. Participating per cent holders.
6. Stockholders.

Filed concurrently herewith is a list of the persons included in the foregoing classes.

In the light of the Lathrap case, supra, holders of participating per cents are not treated as creditors, but as holders of rights subordinate to those of creditors and superior to those of stockholders.

The only persons directly affected by the plan to be submitted hereunder are the unsecured creditors, the priority creditors, the holders of landowners' royalties, and the per cent holders (per cent holders [56] being those persons to whom the debtor sold percentage interests under a permit of the California State Corporation Department for the purpose of raising capital to drill the four wells

hereinabove mentioned in the El Segundo District, all as is more fully set forth in the applications to the Corporation Commissioner). The rights of secured creditors are not affected by this plan because the plan contemplates that the assets will be transferred, as hereinafter set forth, to a new corporation, subject to the rights of secured creditors.

Landowners' royalties which carry with them the right of forfeiture of the oil and gas leases under which such royalties are payable and where such right of forfeiture has not, prior to the filing of the petition in bankruptcy, been waived either in writing or by the conduct of the parties, will be paid in full in the same manner as priority claims. Where, however, the facts disclose that prior to the filing of the proceedings hereunder by the debtor, the landowners, by writing or by their conduct, have legally waived the right of forfeiture as to any of the unpaid royalties, the same will be treated the same as those in the class of unsecured creditors. Should any controversy arise as to the proper status of such claims of holders of landowners' royalties, the same shall be determined by the above entitled Court in the above entitled proceeding upon hearing after notice.

V. GENERAL SCHEME OF THE PLAN EXCLUSIVE OF PARTICIPATING PER CENT HOLDERS

(1) Debtor will cause to be organized a new corporation, with five directors, under the laws of the State of California, with an authorized capital

stock of $100,000.00, divided into a hundred thousand common shares of $1.00 par value per share. A copy of the Articles of Incorporation of such new corporation is filed concurrently herewith. The name of the said corporation shall be El Segundo Oil Co., or such other suitable name as may be approved by the California Secretary of State. Upon the confirmation of this plan, and upon the issuance of a permit by the California State Corporation Department, said new corporation will issue capital stock to the general unsecured creditors herein on the basis of 20 per cent of the amount of their claims. In other words, if an unsecured creditor's claim amounts to $100.00, he will be entitled to received $20.00 par value of the capital stock of said new corporation. Such stock will be accepted by such general unsecured creditors in full payment, release and discharge of their claims against the debtor. Thereupon the general unsecured creditors with allowed claims shall sell such stock so issued to them to Western Mesa Oil Corporation at par for cash, and Western Mesa Oil Corporation shall thus become the sole stockholder of the new corporation.

(2) Said new corporation will cause to be paid in full all priority claims and all costs and expenses of administration, as the same may be fixed and determined by the above Court upon hearing after notice. Such amount will be deposited as the above entitled Court directs, prior to the final confirmation of this plan, by the Western Mesa Oil Corporation, a corporation, for the benefit of such

new corporation. In the event that this plan is finally confirmed, said new corporation will issue its demand note to the Western Mesa Oil Corporation for such amount as it may have deposited in Court for the payment of priority claims and costs and expenses of administration, such demand note to bear interest at the rate of six per cent per annum from date until paid. In the event such plan is not finally confirmed, then such sum so deposited by the Western Mesa Oil Corp. will be returned to it. The new corporation will take title to [57] and possession of all of the assets of the debtor corporation as of the date of the final confirmation of this plan. The present receivership, without any expense of any kind to said new corporation and without any interference with the title and possession of the new corporation of the assets so acquired from the debtor corporation, shall continue until J. R. McKinnie shall exercise, or fail to exercise, the option hereinafter mentioned within the time limited, or such further time as may be granted by Western Mesa Oil Corporation. During the option period, the said McKinnie shall have the right to designate someone on his behalf to follow the new corporation in its operation of the wells, with free access to the debtor's premises and the wells and equipment and the books and records of the new corporation, during all reasonable business hours, In case any dispute arises between the new corporation and said McKinnie, or such person so designated by him, respecting the operation of the wells and the use of such assets, the same shall be

determined by the above entitled Court upon notice. During the thirty day option period, or any extension thereof, the new corporation shall have the right to operate the debtor's wells, but shall not use any of the proceeds therefrom, or any of the money on hand, except for necessary and proper current operating expenses, and shall not remove any of the equipment from said wells, except upon order of this Court upon notice to said McKinnie. It is the purpose and intent of this provision that such assets taken over by the new corporation upon the final confirmation of this plan shall remain intact, as far as is reasonably possible, until the exercise by McKinnie, or his failure to exercise, such option.

(3) If claims are filed by creditors in amounts differing from those set forth in the schedules filed herein, or if creditors file claims which are not listed in the schedules, or if there appear to be any objectionable claims filed, the debtor, or any party in interest, including the new corporation, shall have the right to object to the allowance of the same, and such alleged creditors shall participate in the plan as confirmed, only on the basis of the amount of their claims as may finally be allowed by this Court. This provision shall include the right to reject any and all executory contracts, including the contract held by R. P. Cooney for the payment to him of 2% of the gross amount received from the Standard Oil Co. for the sale of oil to it, and the right to object to the allowance of any claim for damages filed herein based upon

the rejection of any executory contract. The said R. P. Cooney agrees that any such claim of his shall not be allowed for a sum in excess of $5193.00.

(4) In connection with the holders of participating per cents, the debtor states that for the purpose of financing and securing the necessary capital to defray part of the costs of drilling the El Segundo wells, debtor filed an application for a permit to the California State Corporation Department, setting forth that it contemplated drilling such wells and that for the purpose of raising such capital it desired to sell such percentage interests; that such permit was obtained, and such percentage interests were sold, pursuant to such permit, and the moneys raised therefrom were used by the debtor as capital for the purpose of defraying, insofar as said moneys were available, the cost of drilling such wells.

(5) In view of the insolvent condition of the debtor, a majority in number and amount of general unsecured creditors are willing to accept capital stock of the new corporation on the basis of twenty cents (20c) on the dollar of their claims. Upon the confirmation of this plan, the said Western Mesa Oil Corporation shall [58] forthwith purchase for cash at par the capital stock of the new corporation issued to the unsecured creditors and shall thus become the sole stockholder of the corporation.

(6) The debtor requests that notice of the time and place of the hearing on the confirmation of this plan be sent to the debtor's stockholders, and that

upon such hearing the Court make a finding that the debtor is insolvent and there is not any equity in its assets for the benefit of the stockholders and that they may be disregarded in connection with this plan, except as herein provided.

(7) Debtor undertakes to cause said new corporation to assume the obligations, to make the agreements, and to carry out the provisions of this plan, insofar as it pertains to such new corporation.

(8) Said new corporation and its stockholders will, upon the final confirmation of this plan, grant an option to J. R. McKinnie, the Vice-President of the debtor corporation, providing that time is of the essence and that the same must be exercised within thirty days from the date of the final confirmation of the plan. Under this option said J. R. McKinnie shall have the right, for and on behalf of the debtor corporation and its stockholders, to purchase from the said Western Mesa Oil Corporation all of the capital stock of the new corporation at a price which shall be equal to twenty per cent of the allowed general unsecured claims (the said Western Mesa Oil Corporation having, in the meantime, acquired all of such capital stock from the holders thereof at par, as above provided), plus interest thereon at six per cent per annum until paid from the date of the purchase of the said capital stock by the Western Mesa Oil Corporation from the creditors, plus an additional sum for reasonable and proper attorneys' fees, necessarily and properly incurred by and on behalf of such new

corporation, or Western Mesa Oil Corporation, in connection with and negotiating for, and the consummation of, this plan, the organization of such new corporation, and the issuance of stock thereunder, and the adjustment of the controversies with the per cent holders and such other matters as may be reasonable and necessary in connection with properly carrying out this plan, plus expenses, not paid for out of production, necessarily and properly incurred by said new corporation, and said Western Mesa Oil Corporation, in connection with this plan and its consummation, plus an additional sum of $2500.00 as a bonus. Should any controversy arise between said J. R. McKinnie and said new corporation and/or Fraser over such fees and expenses, such controversy shall be determined by the above Court upon hearing after notice. Should said J. R. McKinnie elect to exercise such option, he shall have the right to replace the Board of Directors of the new corporation with directors of his own choice. Said J. R. McKinnie agrees that, in the event he exercises such option, he will give the stockholders of the debtor corporation an option for a period of ten days after written notice, to share with him in the benefits of such purchase in the proportion that their present holdings bear to the total issued capital stock of the debtor, by paying to him in cash the equivalent portion of his outlay in cash. The said Western Mesa Oil Corporation will purchase the said claim of the National Supply Company, if this plan is finally confirmed, and, concurrently with the granting of

the said option to J. R. McKinnie to purchase the capital stock of the new corporation, said Western Mesa Oil Corporation will likewise grant to J. R. McKinnie an option to purchase within thirty days from the date of the final confirmation of this plan, such secured claim of the National Supply Company for the sum of $46,000.00, less such [59] amounts as may be paid by the debtor or the new corporation on such claim of the National Supply Company after the purchase of such claim by said Western Mesa Oil Corporation, or prior thereto after the date hereof, plus interest at six per cent per annum from the date of such purchase by Western Mesa Oil Corporation. Said J. R. McKinnie will, in the same manner and upon the same basis, offer to the stockholders of the debtor corporation the right to share in the benefits of the purchase of said secured claim of The National Supply Company in the same manner hereinabove set forth for their sharing in the benefits of the purchase of the capital stock of the new corporation by said McKinnie.

(9) It shall be a condition precedent to the right of said J. R. McKinnie to exercise such options, to purchase concurrently therewith from the Western Mesa Oil Corporation (a) the demand note of the new corporation to the Western Mesa Oil Corporation for such amount as Western Mesa Oil Corporation may have deposited and paid out for priority claims and expenses of administration, as aforesaid; and (b) to purchase likewise any other claims of secured creditors herein that said West-

ern Mesa Oil Corporation may have purchased in the interim for an amount equal to the purchase price paid by it for such secured claims, less such amounts as may have been paid thereon by the new corporation and the debtor, plus six per cent per annum until paid on all of the outlays of the Western Mesa Oil Corporation, as hereinabove set forth.

(10) R. P. Cooney, the former Receiver herein, shall be entitled to participate with J. R. McKinnie in the whole enterprise upon such terms as may be agreed upon between him and said McKinnie.

(11) The debtor will execute any and all necessary documents and instruments and take any and all action that may be necessary or desirable to consummate and effectuate this revised arrangement as finally confirmed by the Court. Such new corporation will accept the transfer of title of such assets of the debtor, subject to the rights and liens of the secured creditors hereinabove mentioned, and landowners under their leases, and holders of participating per cents, as provided herein.

(12) The above entitled Court shall retain jurisdiction until the provisions of this arrangement, after its final confirmation, have been fully performed, including (a) the issuance of capital stock by the new corporation to the general unsecured creditors, or their respective nominees; (b) the issuance of notes to Western Mesa Oil Corporation for moneys advanced to such new corporation by said Western Mesa Oil Corporation for the purpose of discharging in cash the administrative expenses and the priority claims; and (c) the exercise, or

failure to exercise within the required time, of the McKinnie options hereinabove referred to.

VI. PARTICIPATING PER CENT HOLDERS

In the event this plan is consented to by a majority in number and amount of the participating per cent holders:

Said new corporation, in acquiring the title to the assets of the debtor, will take title to such assets subject to the rights of the per cent holders as hereinafter set forth, to-wit:

(1) Said new corporation will use the proceeds from the gross production of said wells and pay and distribute the same as follows: [60]

(a) Payments of landowners' royalties.

(b) Payment to secured creditors hereinabove set forth.

(c) Actual operating expenses (actual operating expenses to include a charge of $150.00 for bookkeeping services and an additional amount for actual supervision of the operation of said wells).

(d) The remaining net production will be used and retained by the new corporation until such time as it shall have received an amount equal to the total and aggregate amount that it shall have paid out for priority claims, costs and expenses of administration, claims of unsecured creditors, figured on the basis of 20 cents on the dollar on claims of unsecured creditors as filed and allowed herein, and the claims of secured creditors plus six per cent per annum from the time of payment of

such amounts. However, for the purpose of this subdivision of this plan, to-wit, insofar as participating per cent holders are concerned, the claim of the National Supply Company shall be deemed to be $46,000.00.

(e) After such new corporation has been fully reimbursed as hereinabove set forth, plus six per cent per annum interest, from the net production of the wells as hereinbefore set forth, then and at such time the participating per cent holders will receive thereafter from the production the amount of their royalties as provided for in the respective royalty interest assignments (which provide for a percentage of the gross production less a proportionate operating charge not to exceed $8.00 per month per one per cent) and in addition to the receipt of their regular and current royalty in accordance with their assignments, there shall be set aside by said new corporation a temporary ten per cent participating per cent assignment in the same manner and form and to the same effect as the assignments now held by the per cent holders, which temporary ten per cent participating assignment shall be used for distribution pro rata to the per cent holders until such time as the per cent holders have received from such temporary ten per cent participating assignment an amount equal to the royalty payments which they have waived and/or deferred from the date of the confirmation of the plan to the date that the new corporation has been reimbursed in the manner hereinabove set forth. After such income from such temporary

ten per cent participating royalty interest assignment has repaid to the per cent holders the royalties which they have waived or deferred from the date of the confirmation of the plan to the date on which the new corporation is reimbursed for the moneys expended, as hereinabove set forth, then the income of such temporary ten per cent royalty assignment shall be used to pay such participating per cent holders pro rata an amount equal to twenty per cent of the royalties which accrued to them prior to the date of the confirmation of the arrangement and which were unpaid prior to the date of the confirmation of the arrangement.

In the event that a majority in number and amount of per cent holders do not consent to this plan, then this plan is conditioned upon the above entitled Court making an order that the rights of the per cent holders are subordinate to the rights of creditors, both secured [61] and unsecured, pursuant to the Lathrap case, supra.

VII. ALLOWANCES FOR COMPENSATION AND EXPENSES OF ADMINISTRATION

Concurrently herewith the Court shall direct all persons entitled to do so to file their applications for compensation and expenses as prescribed by the Bankruptcy Act in this type of proceeding, and to include notice of such applications in the notice of hearing on the plan of arrangement, and to have such applications for compensation and expenses heard at the same time and place as the hearing on the confirmation of the plan of arrange-

ment. The new corporation shall in no wise be responsible or charged with any compensation or expenses of administration herein arising on and after the date of the confirmation of the plan of arrangement by the Court.

Dated this 3rd day of December, 1942.

SOVEREIGN OIL CORPORATION,
a corporation, Debtor
By J. R. McKINNIE
Vice-President
GRAINGER & HUNT
By REUBEN G. HUNT
Attorneys for Debtor

The foregoing plan is hereby approved, subject to final approval & confirmation by Court by Dec. 20, 1942.

R. P. COONEY
R. DECHTER
Attorney for Western Mesa Oil Corporation

* * * * * * *

[Endorsed]: Filed Dec. 5, 1942 at ... min. past 10 o'clock A.M. Hugh L. Dickson, Referee. C. M. Commins, Clerk Br.

[Endorsed]: Filed Feb. 8, 1943 at ..... min. past 5 o'clock P.M. Edmund L. Smith, Clerk by E. M. Enstrom, Jr., Deputy. [62]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING REVISED PLAN OF ARRANGEMENT

A meeting of creditors to hear the Debtor's revised plan of arrangement, the filing of application to confirm the same, and the considering or the confirmation thereof and of any objections thereto, came on regularly for hearing in the courtroom of the Honorable Hugh L. Dickson, Referee in Bankruptcy, on December 17, 1942, at the hour of ten o'clock a. m., the Debtor appearing by its attorneys, Grainger & Hunt, by Reuben G. Hunt, the El Segundo Oil Company appearing by its attorney, Raphael Dechter, Cantillon & Glover, by John E. Glover, appearing for all of the per cent holders who have heretofore appeared in response to the Receiver's petition to determine the rights of participating per cent holders, Russell B. Seymour appearing for Charles D. Andrews, the holder of a participating royalty interest of one per cent in El Segundo No. 1 well, and certain stockholders appearing by Dryer, Richards & Page, by Phillip H. Richards, of counsel, and other stockholders appearing in person; and the matter having been duly and regularly heard and considered, the Court finds as follows:

1. That due and proper notice of said hearing has been given to creditors of all classes, to holders of landowners' royalties, to holders of participating royalty interests in the wells of the Debtor, to stockholders of the Debtor, and to all other par-

ties having any interest or concern in the matter.

2. That no objection or opposition to the confirmation of said revised plan of arrangement was presented, except that Russell B. Seymour, on behalf of said Charles D. Andrews, the holder of a one per [63] cent participating royalty interest in El Segundo No. 1 Well, objected to any order subordinating royalties accruing to said Charles D. Andrews as the holder of said one per cent participating royalty interest in said El Segundo No. 1 Well, to the class of creditors as set forth in the revised plan; that said objection was considered by the Court and overruled.

3. That said revised plan of arrangement has been duly accepted in accordance with the provisions of Chapter XI, and that the deposit required by the provisions of said Chapter and by said revised plan of arrangement, amounting to the sum of $8,543.48, has been deposited subject to the order of the Court and in the manner designated by the Court; that all the provisions of said Chapter have been complied with by the Debtor; that the revised plan of arrangement is for the best interests of the creditors of said Debtor; that the revised plan of arrangement is fair and equitable and feasible; that the Debtor has not been guilty of any of the acts or failed to perform any of the provisions which would be a bar to the discharge of the Debtor; and that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by said Act.

4. The Court finds that the fair and reasonable

market value of the assets of the Debtor is the sum of $51,000.00; that the liabilities, as shown by the schedules on file herein, are far in excess of the fair and reasonable market value of such assets; that the Debtor is manifestly insolvent, both by reason of the fact that it is unable to pay its debts as they mature, and also by reason of the fact that the aggregate of its property is not of a fair valuation sufficient in amount to pay its debts, and that there is therefore no equity of any kind in such assets for the stockholders of the Debtor, and that therefore, for the purposes of this revised plan of arrangement the interests of the stockholders as a class may be disregarded.

5. The Court finds that the revised plan of arrangement [64] contemplates that the assets will be transferred to a new corporation, the El Segundo Oil Company, subject to the liens of the claims of secured creditors, and the Court therefore holds that the claims of such secured creditors are not affected by the revised plan.

6. The Court finds that it is true that the class designated in the revised plan of arrangement as participating per cent holders are those persons to whom the Debtor sold participating royalty percentage interests under a permit of the California State Corporation Department for the purpose of raising capital to drill four wells owned by the Debtor in the El Segundo District, and that the funds derived therefrom were used by the Debtor as capital for the purpose of defraying the costs of drilling such wells.

7. The Court finds that the class of participating per cent holders has heretofore been determined by this Court by an order made by this Court on December 5, 1942, and that the revised plan of arrangement contemplates that the assets of the Debtor will be transferred to said new corporation, the El Segundo Oil Company, subject to the rights of participating per cent holders, as set forth in said order of December 5, 1942.

8. The Court finds that in so far as the claims entitled to priority are concerned, including those of taxing units, and such landowners' royalties as the Court may determine to be entitled to priority or status as secured claimants, that the same will be paid in full under the revised plan of arrangement.

AS CONCLUSIONS OF LAW FROM THE FOREGOING FINDINGS, THE COURT CONCLUDES:

That said revised plan of arrangement should be confirmed.

Now, Therefore, It Is Ordered:

1. That said revised plan of arrangement be and the same is hereby confirmed;

2. That V. W. Erickson be and he hereby is designated as [65] disbursing agent or officer for this Court for the purpose of making the necessary disbursements and distributions under such revised plan of arrangement, including the payment of costs and expenses of *administriction,* priority claims, the receipt and distribution of the stock of the new corporation, El Segundo Oil Company, to

the holders of unsecured claims allowed herein, and for the purpose of doing such other things as may be necessary as the agent of this Court to carry into effect such revised plan of arrangement, hereby confirmed;

3. That said Debtor corporation and said V. W. Erickson, as Receiver of the said Debtor corporation, are hereby directed to execute as of December 17, 1942, an assignment of all oil and gas leases and a bill of sale to all personal property, and such other instruments and conveyances as may be necessary to transfer title to all of the assets of said Debtor corporation to said El Segundo Oil Company, subject to the liens of the claims of secured creditors, as set forth in the revised plan of arrangement, and subject to the rights of participating percent holders, as set forth in the order of this Court of December 5, 1942, determining the rights of per cent holders, and to surrender as of December 17, 1942, possession of all of such assets of the Debtor corporation to said El Segundo Oil Company;

4. That the Debtor or any party in interest, including the new corporation the El Segundo Oil Company, shall have the right to object to the allowance of any claims filed herein, and such claims so objected to shall participate in the revised plan of arrangement hereby confirmed only on the basis of the amount of such claims as may be finally allowed by this Court;

5. That said new corporation, El Segundo Oil Company, shall have the right to reject any and

all executory contracts, including the contract of R. P. Cooney for the payment to him of two per cent of the gross amount received from the Standard Oil Company for the sale of oil to it, and the contract of K. O. Gjerset;

6. That the Western Mesa Oil Corporation shall grant an [66] option, as of December 17, 1942, to J. R. McKinnie, to purchase all of the shares of capital stock of the new corporation which said Western Mesa Oil Corporation has acquired, substantially upon the terms and conditions as set forth in paragraphs VIII and IX of the revised plan of arrangement. It is contemplated that the Western Mesa Oil Corporation will stand ready, able and willing to purchase from the unsecured creditors all of the capital stock of the new corporation that may be offered to it, and that the option shall only apply to all of those shares of capital stock which the Western Mesa Oil Corporation is able to purchase from the unsecured general creditors.

It Is Further Ordered that this Court shall retain jurisdiction until the provisions of this revised plan of arrangement have been fully performed, including.

(a) The issuance of capital stock by the new corporation to the unsecured creditors, their assigns or nominees;

(b) The issuance of notes to the Western Mesa Oil Corporation for moneys advanced to such new corporation by said Western Mesa Oil Corporation; and

(c) The exercise or failure to exercise, within the required time, the option to said J. R. McKinnie, referred to in said revised plan of arrangement.

Dated this 17th day of December, 1942.

HUGH L. DICKSON,
Referee in Bankruptcy.

Approved as to form:

GRAINGER & HUNT.
By REUBEN G. HUNT,
Attorneys for the Debtor.
R. DECHTER,
Attorney for El Segundo Oil Company.

[Endorsed]: Filed Dec. 17, 1942. Hugh L. Dickson, Referee. C. M. Commins, Clerk CMC.

[Endorsed]: Filed Feb. 8, 1943. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [67]

[Title of District Court and Cause.]

PROPOSED AMENDMENTS TO FINDINGS OF FACT

Come now the Western Mesa Oil Corporation and the El Segundo Oil Company and propose the following amendments to the proposed findings of fact submitted by Martin & Bowker:

1. On page 2, line 6, after the words "R. Dechter", insert the following:

"and the El Segundo Oil Company, the suc-

cessor in interest pursuant to the plan of arrangement of the debtor, Sovereign Oil Corporation, appearing also by its counsel, R. Dechter"

2. Insert on page 2, paragraph I, line 19, after the words "when due", the following:

"that said lease provides that in the event the landowners desire to exercise a right of forfeiture for non-payment of royalties, they must give to the debtor, as lessee, notice in writing of intention to declare such forfeiture, unless such default is cured within thirty days from the date of the giving of such notice; that up to the date of the filing of the petition herein by the debtor, and up to the time of the hearing of the issues involved herein, between the debtor and the Western Mesa Oil Corporation and the El Segundo Oil Company, on the one hand, and the landowners, on the other hand, the landowners had at no time ever given any notice in writing, or otherwise, to the lessee of any intention to declare a forfeiture for nonpayment of royalty, and it was so stipulated by counsel for the landowners that no such notice had ever been given."

3. Insert at the end of paragraph I on page 2, line 26, the following:

"That immediately after the filing of these proceedings by the debtor, an order to show cause was directed by the receiver to the various landowners, calling attention to the fact that certain license fees and certain taxes had

to be paid, and calling further attention to the fact that certain remedial work had to be done to maintain said wells on production and to prevent said production from being lost. That a hearing was held [68] thereon, at which said landowners were represented. That said receiver was instructed to pledge the credit of this estate for the purpose of making such necessary expenditures and for the purpose of doing such work in order to preserve such production from said well, and that neither at said time nor at any other time was there ever any intention expressed by the landowners of declaring a forfeiture of said lease or that said lease was in default, or that said lease was not in full force and effect."

4. Insert at the end of paragraph III on page 3, line 13, the following:

"That there has been filed a claim as an unsecured creditor for such accrued royalties by said holders of landowners' and overriding royalties."

Dated: January 13, 1943.

Respectfully submitted,

R. DECHTER,

Attorney for Western Mesa Oil Corporation and El Segundo Oil Company.

[Endorsed]: Filed Jan. 14, 1943, Hugh L. Dickson, Referee. E. M. Commins BR.

[Endorsed]: Filed Feb. 8, 1943. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [69]

[Title of District Court and Cause.]

AMENDMENT TO PROPOSED FINDINGS OF FACT SUBMITTED BY H. L. WELCH ON BEHALF OF LANDOWNERS OF WELL No. 1

Come now the Western Mesa Oil Corporation and the El Segundo Oil Company and propose the following amendments to the proposed findings of fact submitted by H. L. Welch:

1. On page 1, line 32, after the words "R. Dechter", insert the following:

"and the El Segundo Oil Company, the successor in interest pursuant to the plan of arrangement of the debtor, Sovereign Oil Corporation, appearing also by its counsel, R. Dechter"

2. Insert on page 2, line 1, after the word "forfeiture", the following:

"by their acts and conduct both before and subsequent to the filing of the petition in bankruptcy herein"

3. Strike, commencing with the word "and" on page 2, line 29, to the end of page 2, and substitute the following:

"that at said time it was made known by the debtor to the landowners that they did not have have sufficient funds with which to pay all royalties owing to date, but that they would endeavor to do so as soon as they were able to secure funds; that such checks for back royalties were accepted after such litigation had

been finally closed and terminated, and after said landowners knew that said debtor was unable to pay such landowners' royalties in full, and that such cashier's checks were accepted by the landowners on account of the landowners' royalties then owing. That on June 19, 1942, the debtor instituted these proceedings in bankruptcy."

4. Strike from paragraph II of the proposed findings, lines 7 to 9 on page 3, and insert the following:

"that said checks were received as payment on account of royalties then due and owing by the debtor to said landowners." [70]

5. Insert proposed amendments heretofore filed to the proposed findings of fact submitted by Martin & Bowker, Nos. 2, 3 and 4.

Dated: January 15, 1943.

Respectfully submitted,
R. DECHTER,
Attorney for Western Mesa Oil Corporation and El Segundo Oil Company.

[Endorsed]: Filed Jan. 18, 1943. Hugh L. Dickson, Referee. C. M. Commins, Clerk. HN.

[Endorsed]: Filed Feb. 8, 1943. Edmund L. Smith, Clerk. By E. M. Enstrom, Jr., Deputy. [71]

[Title of District Court and Cause.]

PETITION FOR LEAVE TO EXPEND FUNDS FOR THE BENEFIT OF THE ESTATE

The petition of R. P. Cooney respectfully shows:

On the 19th day of June, 1942, an original petition was filed by the above named debtor corporation in the above entitled proceeding in the above entitled Court for an arrangement between said debtor corporation and its creditors pursuant to the provisions of Chapter XI of the National Bankruptcy Act of 1898, as amended by the Chandler Act of 1938. Thereafter and on said 19th day of June, 1942, the said petition was approved by the above entitled Court and further proceedings in the administration of the estate were referred by the Court to Hugh L. Dickson, a Referee in Bankruptcy thereof. Thereafter and on the 22nd day of June, 1942, petitioner R. P. Cooney was appointed by the Court as Receiver of the debtor's estate, and thereafter and on the 23rd day of June, 1942, duly qualified. Ever since the 23rd day of June, 1942, the said R. P. Cooney has been and now is the duly appointed, qualified and acting Receiver of the debtor's estate.

On or about the 15th day of July, 1942, the Receiver expects to have paid into the estate the sum of approximately $7900.00 by the Standard Oil Company of California as proceeds of the sale of Oil. The Receiver is confronted with the necessity of making certain expenditures in order to preserve and protect the estate during the pendency of the

arrangement proceedings. These proposed expenditures are as follows:

1. The debtor at the time of the commencement of the bankruptcy operated four oil wells in what is known as the El Segundo District, in Los Angeles County, under leases from landowners. These wells are now being operated by the Receiver with the permission of the above entitled Court. These wells are subject to the jurisdiction of the City of El Segundo, a municipal corporation. An ordinance of that city is in full force and effect wherein it is required that persons operating wells of a character similar to those now being operated by the Receiver must furnish to the city a satisfactory bond in the sum of $5,000.00 for each well so operated. The condition of each of said bonds is that if the well is abandoned by the operator, the operator will satisfactorily clean up the well and the premises and put the premises, as far as is reasonably possible, back into their original *estate* before the well was drilled; and also will respond in damages for any injury to property caused by blowouts, etc.

Heretofore the debtor furnished such bonds to the city through the Hartford Accident and Indemnity Company, an insurance corporation, but this company lately withdrew from such bonds and there are no bonds furnished in order to comply with such ordinance. The City of El Segundo has granted to the Receiver until July 15, 1942, to furnish such bonds. The Receiver has carefully investigated the situation. The Hartford Accident and Indemnity

Company is unwilling to furnish any bonds. The National Automobile Insurance Co. has offered to furnish the required bonds for the four wells on the basis of a cash deposit with it of $500.00 per well, as indemnification, plus the first annual premium of $200.00, making a total of $2200.00. [72] It is absolutely essential to the maintenance and continuation of the debtor's estate that such bonds be issued. Any person, such as a receiver, who does not comply with such ordinance is subject to a misdemeanor penalty of a fine or a jail sentence, or both.

2. The Receiver finds that the property in his possession and control, particularly the oil wells and their equipment, were not covered by adequate insurance at the time of the commencement of the proceedings herein. The amount of insurance at the time of the bankruptcy was $20,000.00 and was about to expire. The Receiver, out of an abundance of caution and for the protection and preservation of the estate and in the light of the apparent values of the property involved, has caused $50,000.00 of insurance to be placed. This covers fire, personal liability, property damage, etc. The premium necessary to be paid at this time to hold this insurance aggregates $500.00.

3. The Receiver also furnished a surety bond in the sum of $25,000.00 as required by the Court order. The first year's premium on this bond is $250.00.

4. In order to cut down labor and fuel expense, the Receiver found, after investigation, that he

could effect substantial savings in this direction if he secured and installed four electric motors and pumps for use at the wells. This will require an expenditure of not to exceed $600.00. This step will result in reducing the man power from four operators to two. Operators are now receiving approximately $175.00 a month each. The gas requirements will also be lessened. Under the pending system, the boilers are being run 24 hours a day 30 days a month. Under the proposed new arrangement, this will be cut down to ten days a month on the average of less than 24 hours a day.

5. In the current operations of the wells the Receiver will require the following:

(a) Tretolite for dehydration purposes	$ 205.40
(b) Rent of office in Los Angeles, per month	35.00
(c) Pulling wells	165.00
(d) Boring under road	100.00
(e) Power and light, per month	115.00
(f) Richfield Oil Co., gas for operations	180.00
(g) Telephone service, per month	20.00
(h) Repairing pump	111.87
(i) Payroll to July 15, 1942, approximately	326.26
Total	$1,258.53

Note: Some of these figures are approximate.

6. The National Supply Company holds conditional sales contracts upon all the pumping equipment and all the tubular equipment. The balance due on these contracts is approximately $152,000.00. The debtor has been making payments to the National Supply Company on the basis of 53¼% of the gross proceeds from the production of what is

[73] known as the No. 1 well. This interest in such gross proceeds has been transferred by the debtor to the National Supply Co. by way of security until such time as the National Supply Company is fully paid. The current payment under this arrangement is approximately $2241.00. Under normal conditions this $2241.00 would be paid out of the money so to be received as aforesaid from the Standard Oil Company.

7. These wells are subject to landowners royalties. Under normal conditions the landowners would be entitled to the payment of approximately $1449.00 out of the money to be received from the Standard Oil Company.

8. J. D. Rush holds herein a conditional sales contract or a chattel mortgage upon two derricks. The arrangement between the debtor and Rush has been for the payment of $150.00 per month on this obligation.

9. R. P. Cooney holds a conditional sales contract upon a derrick, upon which there is now owing, in order to bring it up to date, the sum of approximately $150.00.

10. R. P. Cooney holds a contract with the debtor wherein and whereby he receives a 2% commission upon all oil sold to the Standard Oil Company. There is due upon this contract at this time approximately $156.00.

11. The American Pipe and Steel Corporation holds conditional sales contracts on ten tanks and four gas traps, all of which are necessary in the carrying on of the debtor's business and the opera-

tion of the wells. Under normal conditions the debtor was required to pay this company approximately $500.00 a month.

These items total approximately $9,454.52. The money coming from the Standard Oil Company is insufficient to meet them all at this time. It is vitally necessary, in order to protect and preserve the debtor's estate, the operating expenses above specified, and particularly the furnishing of such bonds, viz:

1. Bonds	$2,200.00
2. Insurance	500.00
3. Receiver's bond premium	250.00
4. Four electric motors and pumps, approximately	600.00
5. (a)-(i) Tretolite, etc.	1,258.53
	$4,808.53

be taken care out of the money so to be received from the Standard Oil Company, even though the other payments above specified are deferred until later. The Receiver is of the opinion that if these operating expenses are now taken care of, he can operate these wells successfully at a minimum expense and in a short time be able to meet these other requirements, either wholly or partially, to a reasonable extent and eventually get the estate in such a condition that a satisfactory arrangement for the future can be effected between the debtor corporation and all of its creditors.

The Receiver is not advised of the exact contract relations between the debtor corporation and National Supply Company, the landowners, the American Pipe and Steel Corporation, and J. D. Rush.

They should be required to appear herein and set forth the exact nature and character of their contracts and claims against the debtor estate. The names of the landowners, so far as the Receiver has been able to ascertain are set forth in "Exhibit A" attached hereto and made a part hereof. [74]

The schedules of the debtor filed herein show total liabilities of $226,600.82, consisting of:

Taxes	$ 3,516.11
Secured creditors	165,382.48
Unsecured creditors	53,101.31
Landowners' royalties	4,600.92

and total assets of $147,650.00, consisting of:

Oil and Gas Leases	$145,000.00
Cash	100.00
Royalty interest	1,000.00
Crude oil	900.00
Office furniture	500.00
Deposits	150.00

The Receiver is endeavoring to work out an economy program whereby the costs of operation can be greatly reduced over what they were at the time of bankruptcy. If he has the cooperation of all of the parties interest to this end, he is of the opinion that he can operate the four wells upon the basis of producing between two and three thousand dollars net a month for the benefit of the estate, out of which can be made reasonable payments in proportion to the equities involved to the secured, priority and unsecured creditors. The four wells are now producing a little less than 300 barrels of oil per day.

Wherefore, Receiver prays that a time and place be fixed for the hearing of this petition and that due notice thereof be given to the parties herein mentioned; that an order issue herein directing said persons to show cause at the time and place of the hearing why the Court should not grant this petition and authorize the Receiver to make the operating expenditures specified by him in this petition even though he will be unable to meet, at this time, the other resuirements set out in said petition; that upon such hearing an appropriate order be made; and for general relief.

Dated this 7th day of July, 1942.

R. P. COONEY
Receiver
GRAINGER & HUNT
By REUBEN G. HUNT
Attorneys for Receiver [75]

EXHIBIT A

[Printer's Note: Exhibit A attached here is not reproduced as it is identical with Exhibit A minus the detailed list of stockholders of Well No. 2*, which is set out in full starting at page 55 of this printed record.]

[Verified].

[Endorsed]: Filed Jul 8, 1942. Hugh L. Dickson, Referee. E. M. Commins, Clerk CMC

[Endorsed]: Filed Feb. 8, 1943. Emund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [78]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon consideration of the petition filed herein by R. P. Cooney, Receiver of the estate of the above named debtor in proceedings herein under Chapter XI of the Bankruptcy Act for an arrangement between the debtor and its creditors, for an order authorizing him to make certain expenditures in connection with his operation of the debtor's business,

It Is Hereby Ordered that The National Supply Company, American Pipe and Steel Corporation, J. D. Rush, and the Landowners of Wells Nos. 1, 2, 3 and 4 of the debtor as specified in said petition, be and they are, and each of them is, hereby required to appear before the undersigned Referee in Bankruptcy, 343 Federal Building, Temple and Spring Streets, Los Angeles, California, on Tuesday, July 14, 1942, at 2 P.M., then and there to show cause why said petition should not be granted.

It Is Hereby Further Ordered that such petition and this order to show cause may be served by the Receiver upon said parties by mailing copies of the same to said persons through the Los Angeles Post Office on or before Friday, July 10, 1942.

Dated this 8th day of July, 1942.

HUGH L. DICKSON
Referee in Bankruptcy

[Endorsed]: Filed July 8, 1942. Hugh L. Dickson, Referee. E. M. Commins, Clerk, CMC.

[Endorsed]: Filed Feb. 8, 1943. Edmund L. Smith, Clerk by E. M. Enstrom, Jr., Deputy. [79]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California,
County of Los Angeles.—ss.

Helen Hooper, being first duly sworn, deposes and says:

That affiant is a citizen of the United States over the age of eighteen years and is not a party to the within action.

On July 10, 1942, affiant deposited in the United States Mail at Los Angeles, California, envelopes addressed to the hereinafter listed parties, each containing true copies of the Order to Show Cause and the Petition for Leave to Expend Funds for the Benefit of the Estate, heretofore filed herein, and which envelopes were sealed and postage thereon prepaid. Said envelopes were addressed to the following:

The National Supply Company
American Pipe and Steel Corporation

Landowners Committee of landowners of Well #1 as listed in "Exhibit A" of said petition

Landowners of Well #2 as per list furnished by their representative, Bank of America, Inglewood Branch

Landowners of Well #3 as per "Exhibit A" of said petition

Landowners of Well #4 as per "Exhibit A" of said petition.

HELEN HOOPER

Subscribed and sworn to before me this 14th day of July, 1942.

[Seal] ADELE O. CARVER,

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed July 14, 1942. Hugh L. Dickson, Referee. C. M. Commins, Clerk, JB.

[Endorsed]: Filed Feb. 8, 1943. Edmund L. Smith, Clerk by E. M. Enstrom, Jr., Deputy. [80]

[Title of District Court and Cause.]

ORDER GRANTING PETITION FOR LEAVE TO EXPEND FUNDS FOR THE BENEFIT OF THE ESTATE

R. P. Cooney, the duly appointed, qualified and acting Receiver of the estate of the above named debtor corporation in proceedings herein under

Chapter XI of the National Bankruptcy Act, as amended by the Chandler Act of 1938, for an arrangement between the said debtor corporation and its said creditors, having filed herein his petition for leave to expend funds for the benefit of the estate; and the undersigned Referee in Bankruptcy having, upon the filing of said petition, issued herein an order directing interested parties to appear before the Court at a time and place specified then and there to show cause, if any there be, why the said petition should not be granted,

And the said petition coming on regularly for hearing before said Referee this 14th day of July, 1942, the Receiver appearing in person; Reuben G. Hunt, of Grainger & Hunt, appearing as counsel for the Receiver; R. Dechter, appearing as counsel for J. D. Rush; George T. Goggin appearing as counsel for American Pipe and Steel Corporation; A. R. Tuthill, of Flint & Mackay, appearing as counsel for National Supply Company, and various holders of landowners royalties appearing in person or by counsel, and all parties having been heard, and the Court having been fully advised in the premises, and no adverse interest being represented so far as the purposes of said petition are concerned, with the exception of the National Supply Company and its objection having been heard and considered by [81] the Referee and overruled, and except the holders of certain landowners royalties, and their objection having been considered by the Referee and overruled, and the matter having been submitted to the Referee for decision,

It Is Hereby Ordered that the said petition be and the same is hereby granted, and that the said Receiver be and he is hereby authorized to make the expenditures specified in the petition as being necessary for the preservation of the estate, such expenditures not to exceed $5,000.00 without further order of the Court.

It Is Hereby Further Ordered that the said Receiver shall prepare and file with the Court on or before Friday, August 7, 1942, a report of his activities in the meantime and shall send a copy of said report to all the parties to whom a copy of the said petition was mailed prior to this hearing on June 14, 1942.

It Is Hereby Further Ordered that this matter be and the same is hereby continued to Thursday, August 13, 1940, at 2 P.M., for further proceedings in connection with the receivership and for the consideration of any other matters that may be brought on for attention by the Court at that time.

Dated this 14th day of July, 1942.

HUGH L. DICKSON
Referee in Bankruptcy

Approved as to form:

GEORGE T. GOGGIN
Attorney for American Pipe and Steel Corporation

FLINT & MACKAY
By ARCH R. TUTHILL
Attorneys for National Supply Company

R. DECHTER
Attorney for J. D. Rush

GRAINGER & HUNT
By KYLE Z. GRAINGER
Attorneys for Receiver

[Endorsed]: Filed July 22, 1942. Hugh L. Dickson, Referee. C. M. Commins, Clerk, CMC.

[Endorsed]: Filed Feb. 8, 1942. Edmund L. Smith, Clerk by E. M. Enstrom, Jr, Deputy. [82]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER AS TO THE PROPER STATUS OF CLAIMS OF LANDOWNERS' ROYALTIES FROM SOVEREIGN NUMBER 2 AND NUMBER 4 WELLS IN THE EL SEGUNDO DISTRICT

To the Honorable Hugh L. Dickson, Referee in Bankruptcy for the Above Named Debtor Estate:

The petition of El Segundo Oil Company and the Western Mesa Oil Corporation respectfully shows as follows:

I.

That the El Segundo Oil Company is the successor in interest to the debtor above named, pursuant to a revised plan of arrangement approved by the above Court, the order approving said revised plan having now become final; that under said revised plan of arrangement the El Segundo Oil Company is given the right to object to the allowance or disallowance of any claim; that your petitioner Western Mesa Oil Corporation is a party in interest in the above proceeding, being interested therein both as a creditor of the debtor and as a stockholder of the El Segundo Oil Company.

II.

That on or about December 9, 1942, a petition was filed by the debtor above named and by V. W. Erickson, as receiver of the debtor, and by the Western Mesa Oil Corporation, asking this court to determine the rights and status of the holders of landowners' and overriding royalties. That said petition came on for hearing on December 17, 1942, at the hour of ten o'clock a.m. That at said hearing the holders of landowners' royalties and overriding royalties on wells known as Sovereign No. 2 and Sovereign No. 4, appeared by their attorneys, Martin & Bowker, and the holders of landowners' and [83] overriding royalties on well No. 1, or "El Segundo Block 31 Community Oil and Gas Lease" appeared by their attorney, H. L. Welch. Evidence was duly heard as to the status of the holders of such landowners' royalties and overriding royalties

in all three wells. The matter was submitted and thereafter an order was entered on the 20th day of January, 1943, as to Sovereign No. 2 and No. 4 wells in the El Segundo District of the County of Los Angeles, a copy of which order is attached hereto and marked Exhibit A.

III.

That said order of January 20, 1943, is erroneous for the following reasons:

1. That said order is contrary to law.

2. That said order is contrary to the evidence, and the evidence is insufficient to sustain said order.

3. That Finding No. II of said order is contrary to the evidence in that the evidence will show, among other things, that no forfeiture could be declared without giving a thirty-day notice in writing of intention to declare a forfeiture, and that at no time was any intention of declaring a forfeiture ever given; that by accepting royalties from the receiver, said landowners did waive their claim of any right to exercise a forfeiture; that by the conduct of said landowners and overriding royalty owners, they lulled the debtor into a sense of security that no forfeiture was ever claimed; that no prior claim was ever filed by said landowners and overriding royalty owners, but on the contrary an unsecured claim was filed by said landowners and overriding royalty owners. The evidence will further show that the landowners, by their conduct, waived the "time of the essence" provision of the lease in that the landowners acquiesced in a course

of conduct where royalties were not and had not been paid on time for a long period; that no notice was ever given by the lessors to the lessee reinstating the provision that time was of the essence; that the records of this Court will show that the receiver, by reason of the [84] conduct on the part of the lessors, expended considerable money in developing and improving said leased premises after the alleged right to declare a forfeiture had accrued without any indication being made by the lessors that the lessee had forfeited its rights and that the lease was no longer in force and effect; that said lessors, with full knowledge that there were back royalties unpaid, continued to receive current royalties from the receiver in the same manner as if said lease were in full force and effect; that the acceptance of royalties prior to bankruptcy by the lessors, after defaults, was likewise a waiver of any right to declare a forfeiture.

4. That paragraph I of the Conclusions of Law is not supported by the findings of fact nor by the evidence in this case, but is contrary to the evidence as well as contrary to law. That it is immaterial whether such right of forfeiture was waived either before or after the filing of the petition in bankruptcy, or both; that after the landowners, by their conduct with the receiver, waived their right of forfeiture, the receiver certainly represents the creditors and such waiver would redound to the interests of such creditors.

5. That paragraph II of the Conclusions of Law

is contrary to law and is not supported by the evidence or the findings of fact.

6. That paragraph III of the Conclusions of Law is not supported by the findings of fact, but is contrary to law and is contrary to the evidence, and not supported by the evidence.

IV.

In this connection, your petitioners request that there be transmitted to the Judge the following documents:

1. This petition for review;

2. The reporter's transcript on the hearing on said petition;

3. The petition for determination of rights and status of holders of landowners' royalties, on which said order was made which is sought to be reviewed hereunder;

4. The revised plan of arrangement; [85]

5. Findings of fact, conclusions of law, and order confirming revised plan of arrangement;

6. The proposed amendments to findings of fact, proposed by Martin & Bowker on Sovereign wells Nos. 2 and 4, dated January 13, 1943;

7. The proposed amendments to findings of fact, proposed by H. L. Welch on behalf of landowners of Well No. 1, otherwise described as El Segundo Block 31 Community Well, dated January 15, 1943.

8. Petition for leave to expend funds for the benefit of the estate, dated July 7, 1942, filed by the receiver; and the order to show cause, based thereon, directed to the National Supply Company, Amer-

ican Pipe & Steel Corporation, J. D. Rush, and the landowners of wells Nos. 1, 2, 3 and 4; the affidavit of service thereof; and the order made thereon, dated July 14, 1942, granting petition for leave to expend funds for the benefit of the estate.

Wherefore, your petitioners pray for a review of said order by the Judge, and that said order be vacated and set aside and the status of such holders of landowners' and overriding royalties be determined to be that of an unsecured general creditor.

EL SEGUNDO OIL COMPANY
and
WESTERN MESA OIL CORPORATION
By M. E. FRAZIER
President
Petitioners

R. DECHTER
Attorney for Petitioners [86]

State of California
County of Los Angeles—ss.

M. E. Frazier, being by me first duly sworn, deposes and says: that he is the President of El Segundo Oil Company and of Western Mesa Oil Corporation, the petitioners herein, and makes this verification for and on behalf of said petitioners, being familiar with the facts set forth therein; that he has read the foregoing petition for review, etcetera, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information

or belief, and as to those matters that he believes it to be true.

M. E. FRAZIER

Subscribed and sworn to before me this 23d day of January, 1943.

[Seal] JESSIE DOLFIN

Notary Public in and for said County and State

[87]

EXHIBIT A

[Printer's Note: Exhibit A is not reproduced here, as it is identical with the "Findings of Fact and Conclusions of Law as to the Proper Status of Claims of Landowners' Royalties from Sovereign Number 2 and Number 4 Wells in the El Segundo District in the County of Los Angeles", which is set out in full starting at page 68 of this printed record.]

[Endorsed]: Filed Jan. 25, 1943. Hugh L. Dickson, Referee. C. M. Commins, Clerk, HN.

[Endorsed]: Filed Feb. 8, 1943. Edmund L. Smith, Clerk by E. M. Enstrom, Jr., Deputy [91]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER AS TO THE PROPER STATUS OF CLAIMS OF LANDOWNERS' ROYALTIES FROM "EL SEGUNDO BLOCK 31 COMMUNITY OIL AND GAS LEASE"

To the Honorable Hugh L. Dickson, Referee in Bankruptcy for the Above Named Debtor Estate:

The petition of El Segundo Oil Company and the Western Mesa Oil Corporation respectfully shows as follows:

I.

That the El Segundo Oil Company is the successor in interest to the debtor above named, pursuant to a revised plan of arrangement approved by the above Court, the order approving said revised plan having now become final; that under said revised plan of arrangement the El Segundo Oil Company is given the right to object to the allowance or disallowance of any claim; that your petitioner Western Mesa Oil Corporation is a party in interest in the above proceeding, being interested therein both as a creditor of the debtor and as a stockholder of the El Segundo Oil Company.

II.

That on or about December 9, 1942, a petition was filed by the debtor above named and by V. W. Erickson, as receiver of the debtor, and by the Western Mesa Oil Corporation, asking this court

to determine the rights and status of the holders of landowners' and overriding royalties. That said petition came on for hearing on December 17, 1942, at the hour of ten o'clock a. m. That at said hearing the holders of landowners' royalties and overriding royalties on wells known as Sovereign No. 2 and Sovereign No. 4, appeared by their attorneys, Martin & Bowker, and the holders of landowners' and [92] overriding royalties on well No. 1, or "El Segundo Block 31 Community Oil and Gas Lease" appeared by their attorney, H. L. Welch. Evidence was duly heard as to the status of the holders of such landowners' royalties and overriding royalties in all three wells. The matter was submitted and thereafter an order was entered on the 20th day of January, 1943, as to said "El Segundo Block 31 Community Oil and Gas Lease", a copy of which order is attached hereto and marked Exhibit A.

III.

That said order of January 20th, 1943, is erroneous for the following reasons:

1. That said order is contrary to law.

2. That said order is contrary to the evidence, and the evidence is insufficient to sustain said order.

3. That paragraph I of said findings of fact is contrary to the evidence in that the evidence will show that said cashier's checks were received on account of back royalty and in that the evidence will show that the debtor stated at the time that such payment on account was made that they were

without funds to pay said royalty in full, and that the holders of landowners' and overriding royalties nevertheless accepted such payment on account.

4. That paragraph II of said findings of fact is contrary to the evidence and the evidence is insufficient to support the same in that the evidence will show that the landowners and holders of overriding royalties did waive their right of forfeiture by accepting rentals on account after the alleged breaches had occurred, and by accepting current royalty payments from the receiver since the filing of the petition herein, and by filing an unsecured creditor's claim for the amount claimed by the landowners and holders of overriding royalties, and further, by the evidence showing that said lease requires a thirty day notice in writing of intention to declare a forfeiture and that at no time was any such notice ever given, and that the landowners and holders of overriding royalties by their conduct lulled the debtor [93] and the receiver into a sense of security that they were not exercising any right of forfeiture.

5. That said order is contrary to the evidence in that the evidence will show that the landowners, by their conduct, waived the "time of the essence" provision of the lease in that the landowners acquiesced in a course of conduct where royalties were not and had not been paid on time for a long period; that no notice was ever given by the lessors to the lessee reinstating the provision that time was of the essence; that the records of this Court will show that the receiver, by reason of the conduct on the part of the lessors, expended consider-

able money in developing and improving said leased premises after the alleged right to declare a forfeiture had accrued without any indication being made by the lessors that the lessee had forfeited its rights and that the lease was no longer in force and effect; that said lessors, with full knowedge that there were back royalties unpaid, continued to receive current royalties from the receiver in the same manner as if said lease were in full force and effect; that the acceptance of royalties prior to bankruptcy by the lessors, after defaults, was likewise a waiver of any right to declare a forfeiture.

6. That paragraph I of the conclusions of law is contrary to the evidence, and the evidence is insufficient to support the same in that the evidence will show that royalty payments were received on account after the alleged breach took place, and that royalty payments were received on account both before bankruptcy and after bankruptcy, and that no proceedings were ever taken by the landowners or overriding royalty owners to enforce a forfeiture or claim a forfeiture, and that checks were received from the receiver for the current month's royalties as they accrued, without objection and without claiming a forfeiture.

7. That paragraph II of the conclusions of law is contrary to law, is not supported by the findings or by the evidence, and is contrary to the evidence.

8. That paragraph III of the conclusions of law is contrary [94] to law, is not supported by the findings or by the evidence, and is contrary to the evidence.

IV.

In this connection, your petitioners request that there be transmitted to the Judge the following documents:

1. This petition for review;

2. The reporter's transcript on the hearing on said petition;

3. The petition for determination of rights and status of holders of landowners' royalties, on which said order was made which is sought to be reviewed hereunder;

4. The revised plan of arrangement;

5. Findings of fact, conclusions of law, and order confirming revised plan of arrangement;

6. The proposed amendments to findings of fact, proposed by Martin & Bowker on Sovereign wells Nos. 2 and 4, dated January 13, 1943;

7. The proposed amendments to findings of fact, proposed by H. L. Welch on behalf of landowners of Well No. 1, otherwise described as El Segundo Block 31 Community Well dated January 15, 1943:

8. Petition for leave to expend funds for the benefit of the estate, dated July 7, 1942, filed by the receiver; and the order to show cause, based thereon, directed to the National Supply Company, American Pipe & Steel Corporation, J. D. Rush, and the landowners of wells Nos. 1, 2, 3 and 4; the affidavit of service thereof; and the order made thereon, dated

July 14, 1942, granting petition for leave to expend funds for the benefit of the estate.

Wherefore, your petitioners pray for a review of said order by the Judge, and that said order be vacated and set aside and the status of such holders of landowners' and overriding royalties be determined to be that of an unsecured general creditor.

EL SEGUNDO OIL COMPANY
and WESTERN MESA OIL
CORPORATION
By M. E. FRAZIER
President
Petitioners

R. DECHTER
Attorney for Petitioners [95]

State of California
County of Los Angeles—ss.

M. E. Frazier, being by me first duly sworn, deposes and says: that he is the President of El Segundo Oil Company and of Western Mesa Oil Corporation, the petitioners herein, and makes this verification for and on behalf of said petitioners, being familiar with the facts set forth therein; that he has read the foreging petition for review, etcetera, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

M. E. FRAZIER

Subscribed and sworn to before me this 23d day of January, 1943.

[Seal] JESSIE DOLFIN

Notary Public in and for said County and State.

[96]

EXHIBIT A

[Printer's Note: Exhibit A is not reproduced here as it is identical with "Findings of Fact and Conclusions of Law as to the Proper Status of Claims of Landowners' Royalties from 'El Segundo Block 31 Community Oil and Gas Lease'," which is set out in full at page 72 of this printed record.]

[Endorsed]: Filed Jan 25, 1943 Hugh L. Dickson, Referee C. M. Commins, Clerk HN.

[Endorsed]: Filed Feb 8, 1943. Edmund L. Smith, Clerk By E. M. Enstrom, Jr., Deputy. [100]

United States District Court, Southern District of California Central Division

No. 40,852-B

In the Matter of

SOVEREIGN OIL CORPORATION, a corporation,

Debtor.

MEMORANDUM OPINION AND ORDER

Petition for review of referee's orders.

Upon this review, there is only one question to

be decided, to-wit: was there a waiver of the landowners' right of forfeiture before the filing of the pettition in bankruptcy? Such question was properly certified by the referee. Under the evidence there was no such waiver by the respondents. Silva v. Campbell, 84 Cal. 420; Alden v. Mayfield, 164 Cal. 6; Del Toro v. Juncos Central Co., 276 F. 894; In re Wise Shoe Co., 26 F.S. 762; 109 A.L.R 1269 and cases cited. The rule is concisely stated in A.L.R., supra, as follows: "Where a forfeiture is based upon the nonpayment of rent, the acceptance of rent accruing prior to that upon nonpayment of which the lessor relies does not constitute a waiver."

Petitioners' contentions that after bankruptcy there was a waiver of the right of forfeiture are beside the question. The plan itself (proposed by debtor) is the answer to such contentions. Therein it is provided that [101] if there was no waiver of the right of forfeiture prior to the filing of the bankruptcy petition, then the landowners' royalties shall be paid in full, in the same manner as priority claims. If there was such waiver prior to the filing of the bankruptcy proceedings, then they were to be "treated the same as those in the class of unsecured creditors." The plan further provides (in the next sentence) that if any controversy arises as to the "proper status of such claims" then the same shall be determined by the bankruptcy court. This clearly refers to a determination based upon whether or not there was a waiver before the bankruptcy proceedings. A controversy

did arise. The referee determined that there was no waiver, and that the status of the claims should be and was that of priority claims. Furthermore, the record discloses that at least as to well number one the landowners refused to acquiesce in the plan of arrangement if by so-doing there would be a waiver of the right of forfeiture.

The referee's orders should be upheld. His findings are amply supported by the evidence and his conclusions sustained by the law.

This court overrules petitioners' objections, adopts the referee's findings and conclusions, and confirms the order reviewed. Respondents may have judgment for costs upon review.

Dated: June 22, 1943.

BEAUMONT
J

Judgment entered Jun 22 1943. Docketed Jun 22 1943 C. O. Book 18 Page 15. Edmund L. Smith, Clerk, By R. B. Clifton, Deputy.

[Endorsed]: Filed June 22, 1943. [102]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Western Mesa Oil Corporation and El Segundo Oil Company do hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled Court dated June 22, 1943, affirming an order of

the Referee in Bankruptcy dated January 20, 1943, determining that the proper status of the claims of the holders of landowners' royalties from Sovereign Wells Nos. 2 and 4 in the El Segundo District of the County of Los Angeles is that of priority claims, and that the claimants are entitled to be paid in the same manner as priority claimants; and likewise affirming an order of the Referee in Bankruptcy dated January 20, 1943, determining that the status of the claims of the holders of landowners' royalties from "El Segundo Block 31 Community Oil and Gas Lease" is that of priority claims, and that the claimants are entitled to be paid in the same manner as priority claimants, which order of the District Court was entered and docketed on June 22, 1943, in C. O. Book 18, page 15, records of the Clerk of the above entitled Court. [103]

Dated: July 12, 1943.

R. DECHTER

Attorney for Western Mesa Oil Corporation and El Segundo Oil Company

7-20-43 Mailed copy to designated attorneys.

TH

[Endorsed]: Filed Jul 19, 1943. [104]

ROYAL INDEMNITY COMPANY

Head Office: New York. A New York Corporation
A Stock Company

Bond No. S-197686

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That We, Western Mesa Oil Corporation and El Segundo Oil Company, as Principals, and Royal Indemnity Company, as Surety, are held and firmly bound unto Sovereign Oil Corporation, Debtor, in the full and just sum of Two Hundred Fifty and No/100 dollars ($250.00), to be paid to the administrators or assigns; to which payment truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of July, 1943.

Whereas, on June 22, 1943, an order was entered by the Honorable United States District Court for the Southern District of California, Central Division, affirming an order of Hugh L. Dickson, Referee in Bankruptcy dated January 20, 1943, determining that the proper status of the claims of holders of landowners' royalties from Sovereign Wells No. 2 and 4 in the El Segundo District of the County of Los Angeles, is that of priority claims, and that the claimants are entitled to be paid in the same manner as priority claimants, and

Whereas, said order also affirmed an order of said Referee dated January 20, 1943, determining that the status of the claims of holders of landowners' royalties from "El Segundo Block 31 Community Oil and Gas Lease" is that of priority claims, and that the claimants are entitled to be paid in the same manner as priority claimants, and

Whereas, an appeal is being taken by Western Mesa Oil Corporation and El Segundo Oil Company to the United States Circuit Court of Appeals for the Ninth Circuit from such order of the United States District Court, Southern District of California, Central Division, dated June 22nd, 1943.

Now the Condition of the Above Obligation is Such, That if the said Western Mesa Oil Corporation and El Segundo Oil Company shall prosecute their writ of appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation will be void; else to remain in full force and virtue. [105]

WESTERN MESA OIL CORPORATION,
By M. E. FRAZIER.
EL SEGUNDO OIL COMPANY
By M. E. FRAZIER
Principals
[Seal] ROYAL INDEMNITY COMPANY
By E. L. COLE
Attorney-in-Fact

I hereby approve the foregoing.

Dated this 19th day of July, 1943.

C. E. BEAUMONT
District Judge

Examined and recommended for approval as provided in rule 29.

R. DECHTER
Attorney

State of California,
County of Los Angeles—ss.

On this 16th day of July in the year 1943, before me, S. P. Gage, a Notary Public in and for the County and State aforesaid, personally appeared E. L. Cole known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact of Royal Indemnity Company and acknowledged to me that he subscribed the name of the said Company thereto as principal, and his own name as Attorney-in-Fact.

[Seal] S. P. GAGE,
Notary Public in and for said County and State.

My Commission Expires July 1, 1945.

State of California,
County of Los Angeles—ss.

On this 17th day of July, A. D., 1943, before me, Jessie Dolfin, a Notary Public in and for said County and State, personally appeared M. E. Frazier, known to me to be the President of the Western Mesa Oil Corporation, the Corporation that executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] JESSIE DOLFIN,
Notary Public in and for said County and State.

State of California,
County of Los Angeles—ss.

On this 17th day of July, A. D., 1943, before me, Jessie Dolfin, a Notary Public in and for said County and State, personally appeared M. E. Frazier, known to me to be the President of the El Segundo Oil Company the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] JESSIE DOLFIN
Notary Public in and for said County and State [106]

[Title of District Court and Cause.]

DIRECTIONS TO CLERK OF THE DISTRICT COURT FOR NOTIFICATION OF FILING OF NOTICE OF APPEAL AND MAILING COPIES THEREFOR TO ALL PARTIES TO THE ORDER, OTHER THAN THE PARTIES TAKING THE APPEAL

To Edmund L. Smith, Clerk of the above entitled Court:

Pursuant to the provisions of Rule 73b of the new Rules of Civil Procedure, you are hereby notified to give notice by mail of the filing of the appeal to the following parties to the order, other than the parties taking this appeal, or to their counsel of record, as follows:

H. L. Welch, Esq. (On behalf of certain landowners)
1114 Quinby Building
Los Angeles, California

Messrs. Martin & Bowker (On behalf of certain landowners)
9945 Commerce Avenue
Tujunga, California

Allan A. McCray,
C/o Britton Bowker, Attorney
9945 Commerce Avenue
Tujunga, California

Dated: July 12, 1943.

R. DECHTER,

Attorney for Appellants Western Mesa Oil Corporation and El Segundo Oil Company.

[Endorsed]: Filed July 19, 1943 [107]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY, ON APPEAL

1. That said order of the District Judge is contrary to law;

2. That the said District Judge erred in denying the petitions for review of these appellants and affirming the orders of the Referee in determining that said landowners were entitled to the status of priority claimants and entitled to be paid as such;

3. That the District Judge erred in failing to determine that respondents waived any right to claim any status as secured or prior claimants, by filing unsecured creditors' claims herein;

4. That the District Judge erred in failing to hold that any right of forfeiture by such landowners was waived by their acts and conduct, in that the evidence will show that the landowners and holders of overriding royalties, with knowledge of defaults, accepted rent after such defaults accrued, both from

the debtor prior to the filing of the proceedings in the above entitled Court, and from the receiver subsequent thereto, and in that the evidence will show that by their conduct they indicated and led the debtor, as well as the receiver, to believe that they recognized the lease as being in full force and effect, and [108] that they never took any overt act or steps to exercise any right of forfeiture;

5. That the District Judge erred in failing to hold that said landowners were estopped from claiming to have any right of forfeiture and from asserting any right to the status of a priority or secured claimant;

6. That the District Court erred in finding that the landowners refused to acquiesce in the revised plan of arrangement, if by so doing there would be a waiver of the right of forfeiture, in that there is no evidence of any kind to support such finding and in that the evidence will clearly show that the landowners received payments of royalties after their alleged right to forfeiture had accrued, without exercising such right, but on the contrary leading the debtor and the receiver, and the successor of the debtor and receiver to believe that said lease was in full force and effect, and by permitting the receiver to act under said lease as if such right of forfeiture had been waived and abandoned;

7. That the District Court erred in failing to hold that the El Segundo Oil Company, as successor to the debtor and receiver, and the Western Mesa Oil Corporation, had the right to object to any claims on any grounds available to them under the law;

8. That the District Court erred in failing to consider the objection of the receiver, the predecessor in interest of the El Segundo Oil Company, and the Western Mesa Oil Corporation, as being in the nature of declaratory relief for the purpose of declaring the status of the claims of landowners and overriding royalties, and in failing to give a liberal construction to such petition to determine the status of such claimants of landowners' and overriding royalties;

9. That the District Court erred in holding and determining that the objections to the claims of landowners' and overriding royalties were limited to the acts and conduct of the landowners and overriding royalty holders before the commencement of the proceedings in the [109] bankruptcy court, and further erred in disregarding and rejecting the evidence offered of acts and conduct of such claimants subsequent to the commencement of such proceedings.

Dated: July 19, 1943.

R. DECHTER,

Attorney for appellants El Segundo Oil Company and Western Mesa Oil Corporation

[Endorsed]: Filed Jul. 20, 1943. [110]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellants herein designate the entire record before the District Court, and embracing the following:

1. Debtor's petition under Chapter XI of the Bankruptcy Act;

2. Order appointing V. W. Erickson as receiver herein;

3. Petition of the receiver and Western Mesa Oil Corporation of December 9, 1942, for determination of the rights and status of holders of landowner's royalties and overriding royalties; and the order to show cause issued thereon, dated December 10, 1942;

4. The reporter's transcript on the hearing on said petition, together with all exhibits offered directly and by reference, including receiver's exhibits 1 to 3, inclusive, and receiver's exhibits by reference, including, to-wit: the claims of the Edlou Company, et al., for $1,072.94, which is on behalf of the landowners in Well No. 4; Edlou Company for $1,346.55 on behalf of the landowners in Community Lease No. Two-B; A. A. McCray, for holders of overriding royalties in El Segundo Community Lease No. Four-A, $422.85; and A. A. McCray, for holders of overriding royalties in El Segundo Community Lease No. [111] Two-B, $149.88 (Rep. Tr. p. 7, lines 6 to 13): and claim filed by A. A. McCray, Wm. H. Ramsaur and

F. R. C. Fenton, in the sum of $2,887.58 on Well No. 1 (Rep. Tr. p. 8, lines 17 to 21, and p. 9, lines 5 to 7);

5. The findings of fact, conclusions of law, and orders of the Referee determining the status of landowners' royalties, dated January 20, 1943 (being two orders);

6. The revised plan of arrangement and application to confirm the same, dated December 7, 1942;

7. The findings of fact, conclusions of law, and order confirming revised plan of arrangement, dated December 17, 1942;

8. The proposed amendments to findings of fact, proposed by Martin & Bowker on Sovereign Wells Nos. 2 and 4, dated January 13, 1943;

9. The proposed amendments to findings of fact, proposed by H. L. Welch on behalf of landowners of Well No. 1, otherwise described as El Segundo Block 31 Community Well, dated January 15, 1943;

10. Petition for leave to expend funds for the benefit of the estate, dated July 7, 1942, filed by the receiver; and the order to show cause based thereon, directed to the National Supply Company, American Pipe & Steel Corporation, J. D. Rush, and the landowners of Wells No. 1, 2, 3 and 4; (the affidavit of service thereof; and the order made thereon, dated July 14, 1942, granting petition for leave to expend funds for the benefit of the estate;

11. The petitions for review (two) from the aforesaid two orders filed January 25, 1943;

12. The order of the District Judge dated June 22, 1943;

13. The certificates of Referee on review (two) from said two orders, one of said certificates being dated February 5, 1943, and the other undated;

14. The notice of appeal;

15. Directions to the Clerk for notification of filing of [112] notice of appeal and mailing copies thereof to all parties to the order;

16. Statement of points upon which appellants intend to rely on this appeal; and this designation of contents of record on appeal.

Dated: July 19, 1943.

R. DECHTER,

Attorney for appellants Western Mesa Oil Corporation and El Segundo Oil Company, as successor to V. W. Erickson, as receiver of the above named debtor.

AFFIDAVIT OF SERVICE BY MAIL—1013a, CCP

State of California,
County of Los Angeles, ss.

G. A. Johnson, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 633 Subway Terminal Building, Los Angeles, California; that on the 19th

day of July, 1943, affiant served the within Designation of Contents of Record of Appeal on the respondents in said matter; by placing a true copy thereof in an envelope addressed to the attorneys of record for said respondents, at the residence/office address of said attorneys, as follows: "H. L. Welch, Esq. 1114 Quinby Building, Los Angeles, California"; Messrs. Martin & Bowker, 9945 Commerce Ave., Tujunga, California; and Allen A. McCray, C/o Britton Bowker, Attorney, 9945 Commerce Avenue, Tujunga, California" and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or/and there is a regular communication by mail between the place of mailing and the place so addressed.

G. A. JOHNSON.

Subscribed and sworn to before me this 19th day of July, 1943.

[Seal] JESSIE DOLFIN

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed July 20, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF ATTORNEY FOR APPELLANTS FOR EXTENSION OF TIME IN WHICH TO DOCKET RECORD ON APPEAL

United States of America
Southern District of California
Central Division—ss.

R. Dechter, being first duly sworn, upon oath deposes and says: that he is an attorney at law duly enrolled and authorized to practice in the District Court of the United States, Southern District of California, Central Division. That he is the attorney of record for Western Mesa Oil Corporation and El Segundo Oil Company, who have given notice of appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a decision of the said District Court of the United States, Southern District of California, Central Division, with respect to the status of landwoners' claims in the above entitled estate.

That under subdivision g of Rule 73 of the Federal Rules of Civil Procedure, the record on appeal should be docketed in the appellate court within forty days from the date of the notice of appeal. That such forty day period within which the record on appeal should be docketed will expire on the 28th day of August, 1943.

That practically all of the various documents which constitute the record on appeal have been furnished to the Clerk of the said District Court for certification. That included in said record, however, are [114] certain exhibits as to which

instructions have been given to the said Clerk for the photostating thereof, such photostatic copies to be made a part of the record. The Clerk has advised affiant that the time for filing the record on appeal and docketing the action should be extended. The Clerk has further advised affiant that war time mailing conditions are such that it would be unsafe not to have said time extended. Affiant anticipates that the record will be completed and ready for transmission to the United States Circuit Court of Appeals in San Francisco in sufficient time, but in the interests of insuring the timeliness of such filing and docketing and in accordance with the suggestion of the Clerk as above set forth, your affiant respectfully requests that this Court make an order extending the time within which the record on appeal shall be filed and docketed in the United States Circuit Court of Appeals, for the Ninth Circuit, for a period of thirty days from and after August 28th, 1943, or to and including the 28th day of September, 1943.

R. DECHTER

Subscribed and sworn to before me this 26th day of August, 1943.

JESSIE DOLFIN

Notary Public in and for said County of Los Angeles, State of California

[Endorsed]: Filed Aug 26, 1943. [115]

[Title of District Court and Cause.]

ORDER EXTENDING TIME IN WHICH TO DOCKET RECORD OF APPEAL

Upon reading and filing the affidavit of R. Dechter, attorney for Western Mesa Oil Corporation and El Segundo Oil Company, and good cause appearing therefor,

It is Ordered that the time within which said Western Mesa Oil Corporation and El Segundo Oil Company are required to file and docket the record on appeal in the above entitled proceeding, is hereby extended to and including the 28th day of September, 1943.

Dated this 26 day of August, 1943.

BEN HARRISON
United States District Judge

[Endorsed]: Filed Aug. 26, 1943. [116]

[Title of District Court and Cause.]

AFFIDAVIT OF ATTORNEY FOR APPELLANTS FOR EXTENSION OF TIME WITHIN WHICH TO DOCKET RECORD ON APPEAL

United States of America
Southern District of California
Central Division—ss.

R. Dechter, being first duly sworn, deposes and says: That he is an attorney at law duly enrolled and authorized to practice in the District Court

of the United States, Southern District of California, Central Division.

That he is the attorney of record for Western Mesa Oil Corporation and El Segundo Oil Company, appellants herein, who have given notice of appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a decision of the said District Court of the United States for the Southern District of California, Central Division, with respect to the status of landowners' claims in the above entitled estate.

That heretofore the time within which appellants are required to docket the record on appeal was extended to and including the 28th day of September, 1943. That the pressure of trial work and other important matters has made it impossible for your affiant to present to the Clerk all of the necessary documents which are a part of the transcript on appeal. That it appears that it will not be possible to [117] complete the record so as to enable it to be filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit on or before such 28th day of September, 1943. That your affiant respectfully requests that this Court make an order extending the time within which the record on appeal shall be filed and docketed in the United States Circuit Court of Appeals, for the Ninth Circuit, to and including the 28th day of October, 1943.

R. DECHTER

Subscribed and sworn to before me this 27th day of September, 1943.

[Seal] JESSIE DOLFIN
Notary Public in and for said County and State.

[Endorsed]: Filed Sep 30, 1943. [118]

[Title of District Court and Cause.]

ORDER EXTENDING TIME IN WHICH TO DOCKET RECORD ON APPEAL

Upon reading and filing the affidavit of R. Dechter, attorney for Western Mesa Oil Corporation, and El Segundo Oil Company, and good cause appearing therefor,

It Is Ordered that the time within which said Western Mesa Oil Corporation and El Segundo Oil Company are required to file and docket the record on appeal in the above proceedings, is hereby extended to and including the 28th day of October, 1943.

Dated this 28th day of September, 1943.

C. E. BEAUMONT
United States District Judge

[Endorsed]: Filed Sep 30, 1943. [119]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It Is Hereby Stipulated by and between the appellants and the respondents herein, through their respective counsel that the record on appeal in the above entitled case shall include:

1. Order appointing V. W. Erickson as receiver; and

2. Order of December 10, 1942 requiring the holders of landowners' royalties to show cause why their rights should not be determined.

It Is Further Stipulated that in transmitting item No. 6 designated by the appellants on review, to-wit, the revised plan of reorganization, the Clerk may omit the copy of the articles of incorporation of El Segundo Oil Company which is attached to said revised plan.

It Is Further Stipulated that the exhibits which are called for by the appellants' designation may be transmitted in their original form, and that the Court may make an order directing their transmission in original form.

It Is Further Stipulated that the proofs of debt of the Edlou Company and A. A. McCray and the claims filed by A. A. McCray, Wm. H. [120] Ramsaur and F. R. C. Fenton, which were introduced by reference and which were submitted to the Court by Referee's Supplemental Certificate on Review dated March 5, 1943, may be a part of the record on appeal and may be transmitted in original form, and that the Court may make an order

authorizing the transmission of such proofs of debt in their original form.

Dated this 18 day of October, 1943.

RAPHAEL DECHTER
By HARRY A. PINES
Attorney for Appellants
MARTIN & BOWKER
By BRITTON BOWKER
Attorneys for Certain Respondents
H. L. WELCH
Attorney for Certain Respondents

It Is So Ordered this 20th day of October, 1943.

C. E. BEAUMONT
United States District Judge

[Endorsed] Filed Oct 20, 1943. [121]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 121 inclusive contain full, true and correct copies of: Debtor's Original Petition in Proceedings under Chapter XI of the Bankruptcy Act; Approval of Debtor's Petition and Order of Reference under Section 322 of the

Bankruptcy Act; Order Appointing New Receiver; Referee's Certificate on Review of Order Fixing Status of Claims of Landowners' Royalties from El Segundo Block 31 Community Oil and Gas Lease; Referee's Certificate on Review; Petition for Determination of Rights and Status of Holders of Landowners' Royalties; Order to Show Cause dated December 10, 1942; Findings of Fact and Conclusions of Law as to the Proper Status of Claims of Landowners' Royalties from Sovereign Number 2 and Number 4 Wells in the El Segundo District in the County of Los Angeles; Findings of Fact and Conclusions of Law as to the Proper Status of Claims of Landowners' Royalties from El Segundo Block 31 Community Oil and Gas Lease; Revised Plan of Arrangement; Findings of Fact, Conclusions of Law, and Order Confirming Revised Plan of Arrangement; Proposed Amendments to Findings of Fact; Amendment to Proposed Findings of Fact Submitted by H. L. Welch on Behalf of Landowners of Well No. 1; Petition for Leave to Expend Funds for the Benefit of the Estate; Order to Show Cause dated July 8, 1942; Affidavit of Mailing; Order Granting Petition for Leave to Expend Funds for the Benefit of the Estate; Petition for Review of Referee's Order as to the Proper Status of Claims of Landowners' Royalties from Sovereign Number 2 and Number 4 Wells in the El Segundo District; Petition for Review of Referee's Order as to the Proper Status of Claims of Landowners' Royalties from El Segundo Block 31 Community Oil

and Gas Lease; Memorandum Opinion and Order; Notice of Appeal; Cost Bond on Appeal; Directions to Clerk of the District Court for Notification of Filing of Notice of Appeal and Mailing copies thereof to all Parties to the Order, Other than the Parties Taking the Appeal; Statement of Points Upon Which Appellants Intend to Rely on Appeal; Designation of Contents of Record on Appeal; Affidavits of Attorney for Extension of Time in which to Docket Record on Appeal; Orders Extending Time in which to Docket Record on Appeal and Stipulation and Order re Record on Appeal, which, together with original Receiver's Exhibits 1, 2 and 3 and Landowners' Exhibit 1, Proof of Claim of Edlou Company, et al, Landowners in El Segundo Community Lease No. Four-A; Proof of Claim of Edlou Company, et al, Landowners in El Segundo Community Lease No. Two-B; Proof of Claim of A. A. McCray, Trustee, for Holders of Overriding Royalties in El Segundo Community Lease No. Four-A; Proof of Claim of A. A. McCray, Trustee, for Holders of Overriding Royalties in El Segundo Community Lease No. Two-B; Proof of Claim of A. A. McCray, Wm. H. Ramsaur and F. R. C. Fenton and Original Reporter's Transcript of Hearing on Order to Show Cause on Holders of Landowners' Royalties, transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for comparing, correcting and certifying the foregoing record amount to $20.65 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 25 day of October, 1943.

[Seal] EDMUND L. SMITH,
Clerk.
By THEODORE HOCKE,
Deputy Clerk.

[Title of District Court and Cause.]

HEARING ON ORDER TO SHOW CAUSE ON HOLDERS OF LANDOWNERS' ROYALTIES

The following is a stenographic transcript of the proceedings had in the above entitled cause, which came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, at his courtroom, 343 Federal Building, Los Angeles, California, at 10:00 a. m. and 2:00 p. m., on December 17, 1942.

Appearances:

GRAINGER & HUNT
By REUBEN G. HUNT, ESQ.,
appearing on behalf of the Receiver.

RAPHAEL DECHTER, ESQ.
appearing on behalf of the Western Mesa Oil Corporation and El Segundo Oil Company.

H. L. WELCH, ESQ.,
appearing on behalf of certain landowners.

BRITTON BOWKER, ESQ.,
appearing on behalf of certain landowners.

ALLAN A. McCRAY, pro se.

The Referee: In the Matter of Sovereign Oil Company, there are many matters to be heard today.

Mr. Dechter: I think the first matter would be the hearing on the confirmation of the Plan of Arrangement.

(Discussion and evidence concerning Plan of Arrangement and percent holders is omitted from this record.)

TESTIMONY

MARTHA L. TAYLOR,

called as a witness on behalf of the Receiver, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Dechter:

Q. Miss Taylor, you are connected with the Sovereign Oil Corporation? A. Yes, sir.

Q. In what capacity are you connected with them? A. Well, as bookkeeper.

Q. How long have you been employed by the Sovereign Oil Corporation? [2*]

A. Let's see, June, 1939.

Q. You have kept the books since that time?

A. No, sir. I kept them beginning with 1941.

Q. You have also made out checks for the various creditors' obligations, including landowners' royalties? A. Yes.

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*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Martha L. Taylor.)

Q. I show you a typewritten statement and ask you if you prepared that?

A. Yes, I did.

Q. That will show to the Court the back royalty that had been unpaid and the months for which it accrued? A. Yes, sir.

Mr. Dechter: I will offer this in evidence.

The Referee: Have you gentlemen seen it?

Mr. Dechter: I have shown it to counsel.

The Referee: All right, it will be marked Receiver's Exhibit 1.

(The document was marked Receiver's Exhibit 1.)

RECEIVER'S EXHIBIT No. 1

STATEMENT OF UNPAID ROYALTIES SOVEREIGN WELLS, EL SEGUNDO

Payable to Lotowner's Committee (Wm. R. Ramsauer, F. R. C. Fenton, A. A. McCray)

Well No. 1	
March	$ 813.61
April	630.59
May	662.31
June (18 days)	406.25
	$2,512.76

	Payable to Bank of America, Inglewood Branch	Payable to A. A. McCray, Trustee	Total Royalties Due
Well No. 2			
January	$180.22	$ 21.63	$201.85
February	233.34	28.00	261.34
March	352.54	42.31	394.85
April	124.94	14.96	139.90
May	229.62	27.56	257.18
June (18 days)	127.66	15.42	162.98
	$1,248.32	$149.88	$1,398.20

(Testimony of Martha L. Taylor.)

	Payable to Bank of America, Inglewood Branch	Payable to A. A. McCray, Trustee	Total Royalties Due
[Pencil Notation]: 4.			
Well No. 3			
January	$105.36	$ 45.63	$150.99
February	263.81	111.96	375.77
March	199.47	86.16	285.63
April	139.38	59.39	198.77
May	159.48	68.65	228.13
June (18 days)	118.95	51.02	169.97
	$986.45	$422.81	$1,409.26

Well No. 1—Total.....$2,512.76
" " 2 " 1,398.20
" " 3 " 1,409.26

$5,320.22

[Endorsed]: Filed 12-17-42. Hugh L. Dickson, Referee, LMC.

Mr. Dechter: I suppose we can stipulate to this. Will you stipulate these checks were received by Mr. McCray and cashed?

Mr. Bowker: We will stipulate those that were received by Mr. McCray, were endorsed and received by him, and those which were received by the Bank of America were endorsed by the bank.

Mr. Dechter: You will stipulate the Bank of America was [3] designated as disbursing agent for certain land owners under the lease?

Mr. Bowker: That is correct.

Mr. Dechter. I think all these checks might as well be offered as one exhibit.

Mr. Bowker: That is right.

(Testimony of Martha L. Taylor.)

Mr. Welch: Have you check made to the No. 1 Well in there?

Mr. Dechter: Yes.

Mr. Welch: May I see that for a moment?

Mr. Dechter: Oh, that is right, I have a receipt on that.

Mr. Welch: Where is it?

Mr. Dechter: I will offer these checks of the Sovereign Oil Corporation, Your Honor.

The Referee: In this list I see several oil wells. Was there a provision in there that written notice of forfeiture must be given, and if not, corrected within a certain time?

Mr. Dechter: Yes, Your Honor.

The Referee: Was any such written notice given?

Mr. Bowker: No, Your Honor.

Mr. Welch: There never was. We never thought there was forfeiture as far as No. 1 was concerned.

Mr. Dechter: We will stipulate no notice of forfeiture or intention to declare forfeiture was received by Sovereign. [4]

The Referee: From anyone on any one of these four wells, is that correct?

Mr. Bowker: That is correct.

Mr. Welch: That is right.

The Referee: How could you insist on forfeiture if you did not comply with the terms of the lease? If I have a lease from you which provides if I default in any of its terms you must give me a notice in writing that if the default is not cor-

(Testimony of Martha L. Taylor.)

rected within a given number of days the lease will be forfeited—Now if you do not do that, can you declare a forfeiture? That is what I would like to know.

Mr. Welch: I can speak for No. 1 Well, if the Court please, and the answer is during all this time the funds from the royalty for No. 1 Well were impounded by the Superior Court, and it was thought at all times by the land owners that those royalties were being paid. We were assured that those royalties were put in a separate fund, and as soon as the judgment came down from the court they would be paid out.

The Referee: What about you, how can you insist on forfeiture if no notice was ever given?

Mr. Bowker: We can insist on forfeiture at this time and notice of forfeiture would have to be given first and the forfeiture would be based on that notice.

The Referee: What I am trying to get at is this. Are you a general or a secured creditor? If you did not comply [5] with the terms of the lease requiring the notice of forfeiture, would you not be classed as an unsecured creditor?

Mr. Bowker: It is our contention, Your Honor, at this time——

The Referee: I don't want you to tell me your whole case at this time. You need not answer if you do not wish to.

Mr. Bowker: All right.

The Referee: But I am curious, because these things keep running through my mind.

(Testimony of Martha L. Taylor.)

Mr. Welch: If the Court please, on back rent I think that is generally considered an unsecured claim, but if the lessor has a right to declare a forfeiture, the Bankruptcy Courts in some cases have held that the Referee can make an order requiring the Receiver to pay, because the end justifies the means. If the back rent is small and it preserves the property for the estate, it should be paid. That is our position.

Mr. Dechter: Our position is that would be true where there has been no waiver or estoppel on the part of the lessor.

The Referee: All right.

Mr. Dechter: Now does the record indicate those checks were received in evidence, Your Honor?

The Referee: Yes, they will be received as Receiver's Exhibit No. 2. [6]

(The envelope was marked Receiver's Exhibit 2.)

Mr. Dechter: I would like to offer in evidence at this time by reference to the files in this court, if Your Honor please, the proof of debt filed by the landowners on December 5, 1942 as follows:

Edlou Company, et al., for $1,072.94, which is on behalf of the landowners in Well No. 4;

Edlou Company for $1,346.55 on behalf of the landowners in Community Lease No. Two-B;

A.A. McCray, for holders of overriding royalties in El Segundo Community Lease No. Four-A, $422.85;

(Testimony of Martha L. Taylor.)

A. A. McCray, for holders of overriding royalties in El Segundo Community Lease No. Two-B, $149.88.

All of these claims are filed as unsecured creditors' claims.

Do those represent all of the claims filed by your client, counsel?

Mr. Bowker: Yes, but I think Mr. Welch has a claim on file.

Mr. Welch: I filed a claim here on behalf of the No. 1 Well, and I stated when I filed the petition——

Mr. Dechter: My question is, do those represent all of the claims filed?

Mr. Welch: Yes, but I am addressing the court.

The Referee: Did you file a claim for No. 1 Well?

Mr. Welch: Yes, and at that time I had a petition ready [7] to present.

The Referee: I understand that, but I asked you the question, did you file a claim as an unsecured claim on behalf of Well No. 1?

Mr. Welch: I filed a claim and stated I reserved my right to claim this forfeiture.

Mr. Dechter: There is no such statement in any of the claims I have offered.

Mr. Welch: There isn't in the claim. It was made in open court.

Mr. Dechter: I also wish to——

The Referee: I don't know if that would be a very good claim, Mr. Welch, in open court. If you

(Testimony of Martha L. Taylor.)

followed anything in court with any reservations attached to it, that is the record.

All right, go ahead.

Mr. Dechter: I also wish to offer in evidence a claim filed by A. A. McCray, Wm. H. Ramsaur, and F. R. C. Fenton, on August 13, 1942, as landowners, in the sum of $2,887.58.

The Referee: What well was that on?

Mr. Welch: That is No. 1.

Mr. Dechter: And also a claim filed by Marion E. Welch, is that your claim?

Mr. Welch: No.

Mr. Dechter: Then I will withdraw that. Do any of you gentlemen know of any other claims filed by landowners out- [8] side of those I have mentioned?

Mr. Bowker: No.

Mr. Dechter: I would like to ask that those claims be received in evidence by reference.

The Referee: They will be received by reference. Is there a copy of that lease or these leases in evidence here in the record?

Mr. Dechter: Do you gentlemen have copies of the leases?

The Referee: If it is stipulated and agreed there was a provision in there that notice of forfeiture should be given in writing. Can you agree on that?

Mr. Bowker: That is correct.

Mr. Dechter: I think it is a 90-day notice of forfeiture.

Mr. McCray: Except in the assignment.

(Testimony of Martha L. Taylor.)

The Referee: It is also stipulated no written notice of forfeiture on any of these leases was ever given to the Sovereign Oil Company, is that correct?

Mr. Bowker: It is so stipulated.

Mr. Dechter: I believe with that the Receiver will rest unless Mr. Hunt has anything to suggest.

The Referee: Any questions of this witness?

Mr. Hunt: I would like to have the record show, Your Honor, during the administration here the Receiver has paid the current royalties.

The Referee: I understand that. [9]

Mr. Dechter: These checks show that, Mr. Hunt.

Mr. Hunt: All right.

Mr. Dechter: I offered them in evidence.

The Referee: All right, gentlemen, any more questions of this witness?

Mr. Welch: I have a few questions, Your Honor.

Cross Examination

By Mr. Welch:

Q. Miss Taylor, did you deliver the check in June of 1942 in payment for the royalties on No. 1 Well?

Mr. Dechter: Will you pardon me, Mr. Welch. There is one thing I forgot. Did I give you that receipt, in June, on the No. 1 Well? I have not offered that. Did I get it back?

Counsel, will you stipulate this receipt bears the signature of A. A. McCray as Trustee for the landowners?

(Testimony of Martha L. Taylor.)

Mr. Bowker: He accepted the check, that is correct; but he is not Trustee for all of the landowners in that.

Mr. Dechter: He was one of the designated agents for the landowners.

Mr. Bowker: Yes.

Mr. Dechter: Is that correct? Is that stipulated to, counsel?

Mr. McCray: Yes.

Mr. Dechter: At this time I will offer as Receiver's [10] Exhibit next in order, a receipt by Mr. McCray of cashiers checks for landowners' royalties on Well No. 1.

The Referee: What is the date of that?

Mr. Dechter: June 17, 1942.

The Referee: All right, it will be marked Receiver's Exhibit No. 3.

(The document was marked Receiver's Exhibit 3.)

RECEIVER'S EXHIBIT NO. 3

June 17, 1942.

Received of Sovereign Oil Corporation, 704 Park Central Bldg., Los Angeles, California, the following cashier's checks drawn on the Union Bank and Trust Company, 8th and Hill Streets, Los Angeles, California.

Check	#417340—A. A. McCray, Wm. Ramsaur & F. R. C. Fenton	$4,016.77
"	417342—Bank of America, Inglewood, Calif.	436.78
"	417343—Leroy Pinson & Grace Gage Pinson	420.60
"	417344—Frances Palmer Howe	671.95
"	417345—Edlou Company	1,726.58
		$7,272.68

(Testimony of Martha L. Taylor.)

Payment on El Segundo #1 Well to Landowners up to and including February, 1942.

A. A. McCRAY

[Endorsed]: Filed 12-17-42. Hugh L. Dickson, CMC.

Mr. McCray: What date in June did you say?

Mr. Dechter: June 17, 1942.

Mr. Welch: That was the date you delivered the checks, the day before the petition in bankruptcy was filed in this case?

Mr. McCray: Yes.

Mr. Dechter: She has not testified to that.

The Referee: How did these checks leave your possession, through the mail?

The Witness: No; I handed them to Mr. McCray personally.

The Referee: All right.

Cross Examination

By Mr. Bowker:

Q. Had Mr. McCray been up prior to that time to request that money be turned over to him for those past royalties?

A. You mean before the judgment?

Q. Before this time when the checks were actually [11] delivered to him on June 17.

A. He had been up before the judgment, of course, but I could not pay them until I had the judgment in my possession.

Q. In other words, to your knowledge, there was

(Testimony of Martha L. Taylor.)

some litigation here and there was a judgment here, and you were unable, then, to pay these checks until the judgment had been entered, is that correct?

A. Yes.

Mr. Dechter: To which we object on the ground it is a compound question and calls for a conclusion of the witness, and is not proper because there is no foundation laid.

The Referee: I think the judgment which we are to have here this afternoon will decide that, is that right?

Mr. Welch: Here is a copy of the judgment, Your Honor. I was going to get a copy of the Register of Actions to show that this matter was pending all this time. We have the judgment here.

Mr. Dechter: That would be the best evidence, I believe.

The Referee: I would not want this young lady to tell me what she might have done until she got the judgment, because her opinion might differ from mine about a judgment. I would like to see it.

Mr. Welch: Have you got the certified copy?

Mr. Bowker: This is a photostat.

Mr. Hunt: May we stipulate that is a photostatic copy? [12] What is the use of objecting?

Mr. Dechter: We will make no objection on the ground it is not certified if that is what counsel wants.

The Referee: All right.

Mr. Welch: We would like to introduce this.

(Testimony of Martha L. Taylor.)

The Referee: We will call that Landowners Exhibit No. 1.

(The document was marked Landowners Exhibit No. 1.)

LANDOWNERS EXHIBIT NO. 1

Book 1255 Page 367

In the Superior Court of the State of California in and for the County of Los Angeles

No. 429,491

SOVEREIGN OIL CORPORATION, a corporation,

Plaintiff and Cross-Defendant.

vs.

Group #1

F. R. C. FENTON
ETHELWYN LAURENCE
EDITH L. CLARK
MARY E. ARTHUR
ADELE DOROTHY LAUTH
MARY F. HILDER
FLORENCE E. RAMSAUR
WILLIAM H. RAMSAUR
ANNA BARROWS
WILLIAM A. EDWARDS
IVAN S. CUMMINGS

Cross-Complainants and Defendants.

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

Group #2

EDLOU COMPANY, a corporation,
FRANCES PALMER HOWE
ETHEL MAE MARCHER
FRANK A. MARCHER
LEROY PINSON
GRACE GAGE PINSON,
Defendants and Cross-Defendants.

EDWARD L. BLINCOE,
Defendant and Cross-Defendant,

DOROTHY S. FENTON
GEORGIA H. RAMSAUR
SYDNEY R. EDWARDS
SYDNEY MARGARET CUMMINGS
H. L. WELCH
J. POWERS FLINT
METROPOLITAN TRUST COMPANY OF CALIFORNIA, a corporation,
Cross-Defendants,

EDLOU COMPANY, a corporation,
FRANCES PALMER HOWE, LEROY PINSON and GRACE GAGE PINSON,
Cross-Complainants.

JUDGMENT

It appearing to the court that a stipulation for entry of a compromise judgment was entered into on May 1, 1942 by all of the parties to the above

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

entitled cause and their respective attorneys, and that said parties thereby intended to and did compromise and settle their respective claims involved in the above entitled cause in order to avoid further litigation therein, and it further appearing by the terms of said stipulation that said parties and their respective attorneys have consented to the entry of a judgment by this court in accordance with the terms of said stipulation,

It is Hereby Ordered, Adjudged and Decreed as follows:

(1) That Metropolitan Trust Company of California shall be entitled to retain, as and for full satisfaction of its fees, costs and expenses (including its attorney's fees), the sum heretofore deducted by it for its fees, costs and expenses from the oil and gas royalties heretofore deposited with it, viz., the sum of $932.18.

(2) That Group No. Two defendants have and recover from Sovereign Oil Corporation the undistributed oil and gas royalties accrued on August 31, 1941, and retained by Sovereign Oil Corporation, viz., the sum of $3,255.91, which sum shall be paid and distributed to Group No. Two defendants as follows:

$1,726.58 to Edlou Company;

$ 671.95 to Frances Palmer Howe;

$ 420.60 to Leroy Pinson and Grace Gage Pinson;

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

$436.78 to Bank of America, N.T. & S.A., Inglewood Branch, as depositary for the lessors under El Segundo Community Lease No. Two B, the same being the share of said Frank A. Marcher and Ethel Mae Marcher in said sum of $3,255.91.

That Group No. Two defendants have and recover from said Metropolitan Trust Company of California, the sum of $18,744.09, the same being undistributed oil and gas royalties now on deposit with it, which said sum, $18,744.09, shall be paid and distributed by said Metropolitan Trust Company of California, as follows:

$9,939.80 to said Edlou Company;

$3,868.41 to said Frances Palmer Howe;

$2,421.36 to said Leroy Pinson and Grace Gage Pinson;

$1,500.00 to said Ethel Mae Marcher;

$1,014.52 to Bank of America, N. T. & S. A., Inglewood Branch, as depositary for the lessors under El Segundo Community Lease No. Two B, said sum of $1,014.52, being the balance of the share of said Frank A. Marcher and Ethel Mae Marcher in the said sum of $18,744.09.

Said distributions representing the share of said Frank A. Marcher and Ethel Mae Marcher shall be made by said Sovereign Oil Corporation and said Metropolitan Trust Company of California directly to said Ethel Mae Marcher and to said Bank in the

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

amounts specified herein. No deductions covering fees or expenses of any character in connection with said litigation or the settlement thereof shall be chargeable against the shares of said Frank A. Marcher or of Ethel Mae Marcher.

(3) That the balance of the sum of $20,246.89 held on deposit by said Metropolitan Trust Company of California, viz., the sum of $1,502.80, shall be paid by Metropolitan Trust Company of California to the present lot owners' committee (William H. Ramsaur, F. R. C. Fenton and Edith L. Clark) by check. Said check for $1,502.80 shall be made payable to William H. Ramsaur, F. R. C. Fenton and Edith L. Clark, and shall be delivered by said Metropolitan Trust Company of California to said William H. Ramsaur. Said Metropolitan Trust Company of California shall be under no duty or obligation to see that said funds are properly distributed and applied to the payees on the check. After payment of all expenses, costs and fees incurred by said committee on behalf of Group No. One defendants, the balance of said sum remaining, if any, shall be paid and distributed by said committee to Group No. One defendants, their successors and H. L. Welch and J. Powers Flint, according to their respective proportional interests as provided in paragraph (4) (a) hereof.

Upon payment by said Sovereign Oil Corporation of the amount herein provided to be paid by it to Group No. two defendants, as provided by para-

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

graph (2) hereof, viz., the said sum of $3,255.91, and upon payment by said Sovereign Oil Corporation of the amount herein provided to be paid by it to the depositary acting hereunder, viz., the sum of $4,016.77, representing royalties, bonuses and other payments accruing on and after September 1, 1941, to March 1, 1942, and payable by said Sovereign Oil Corporation, as lessee under El Segundo Block 31 Community Oil and Gas Lease, said Sovereign Oil Corporation shall be released from any and all claims for payment of any royalties, bonuses or other payments accruing up to and including March 1, 1942, excepting claim, if any, for refund from reserve fund retained from royalty payments by said Sovereign Oil Corporation to cover lessor's share of taxes.

Upon payment by said Metropolitan Trust Company of California of the sum held on deposit by said Metropolitan Trust Company of California, as herein provided, namely said sum of $20,246.89, said Metropolitan Trust Company of California shall be released from any and all other claims for payment and claims of any nature whatsoever arising or growing out of its Escrow No. 5887.

(4) That all oil and gas royalties, bonuses and other payments becoming due and payable under said El Segundo Block 31 Community Oil and Gas Lease and accruing on and after September 1, 1941, (after the deduction of the expenses hereinafter authorized), instead of being distributed upon a

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

square footage basis as in said lease provided, shall be distributed by the depositary hereunder as follows:

(a) A total of 65% of all of said oil and gas royalties, bonuses and other payments shall be distributed to Group No. one defendants, their successors, and H. L. Welch and J. Powers Flint as follows:

F. R. C. Fenton	12.5320%	of said 65%
Ethelwyn Laurence	6.2660%	" "
Edith L. Clark	17.4876%	" "
Mary E. Arthur	8.1337%	" "
Adele Dorothy Lauth	9.0074%	" "
Mary E. Hilder	6.2660%	" "
William H. Ramsaur	7.07935%	" "
Anna Barrows	2.03342%	" "
William A. Edwards	1.01672%	" "
Ivan S. Cummings	1.01671%	" "
H. L. Welch	6.2660%	" "
J. Powers Flint	7.8325%	" "
Lucien C. Ramsaur	3.0125%	" "
Sydney R. Edwards	3.0125%	" "
Virginia B. Danzy	3.0125%	" "
Pearl Ramsaur	3.0125%	" "
Ben W. Ramsaur	1.0042%	" "
James C. Ramsaur	1.0042%	" "
Sue Ramsaur Jones	1.0042%	" "

(b) A total of 35% of all of said oil and gas royalties, bonuses and other payments shall be distributed to Group No. two defendants as follows:

Edlou Company, a corporation 53.0287% of said 35%

Frances Palmer Howe 20.6384% of said 35%

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

Leroy Pinson and Grace Gage Pinson 12.9180% of said 35%

Ethel Mae Marcher and Frank A. Marcher 13.4149%,of 35%, of which all royalties, bonuses and other payments from September 1, 1941, to date of judgment shall be paid to Bank of America, N. T. & S. A., Inglewood Branch, as depositary for the lessors under said El Segundo Community Lease No. Two B.

(5) That from and after the date of entry of this judgment, and until the election of a successor or successors, the lot owners' committee provided for in said El Segundo Block 31 Community Oil and Gas Lease shall consist of the following persons, to wit: A. A. McCray, Secretary of Edlou Company, a corporation, William H. Ramsaur and F. R. C. Fenton; and in all future elections of said lot owners' committee, said Group No. one defendants, H. L. Welch and J. Powers Flint, or their successors in interest, shall elect two of said committeemen and said Group No. two defendants, or their successors in interest, shall elect one of said committeemen, and to this extent paragraph 26 of said El Segundo Block 31 Community Oil and Gas Lease is hereby amended.

Except as herein otherwise provided, the committee's powers and duties as managing agent are hereby limited to the conduct of investigation as to the rights of the lessors under said lease and their successors, and the making of demands for the

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

enforcement of such rights, and shall not include the incurring of any additional expense without the authorization of said lot owners, as hereinafter provided.

All payments by said Sovereign Oil Corporation of royalties, bonuses and other payments accruing on and after September 1, 1941, as lessee under said El Segundo Block 31 Community Oil and Gas Lease shall be made by said Sovereign Oil Corporation to the lot owners' committee of three, as depositary, or to such other depositary as said lot owners may hereafter designate.

The lot owners' committee shall act as the managing agent of the lot owners, and during such time as it acts as depositary under said El Segundo Block 31 Community Oil and Gas Lease and this judgment, it shall accept and distribute to the various persons entitled thereto the royalties, bonuses and other payments received as depositary. It is authorized to and it may deduct and expend, from such royalties, bonuses or other payments, the sum of $25.00 per month to pay for the employment of an oil engineer for the purpose of testing and checking such oil wells as may be operated upon the premises covered by said lease, and to deduct and retain an additional sum of $25.00 per month as compensation to said committee for their services as such committeemen, and to deduct such additional sums, not to exceed $10.00 for any one month, as may be reasonably necessary for all miscellaneous

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

expenses in the distribution of royalties, bonuses and other payments to the persons entitled thereto.

The committee's acts in such capacity or capacities shall be pursuant to such authority as may be vested in the members thereof by the terms of said El Segundo Block 31 Community Oil and Gas Lease and this judgment or by authorization of the owners of at least two-thirds of the square footage of all lots included in said Block 31 given at a meeting of lot owners duly held as provided by paragraph 26 of said lease.

(6) That said Group No. One defendants, their successors, and H. L. Welch and J. Powers Flint shall be liable in proportion to their respective interests for all expenses incurred on their behalf by the present lot owners' committee up to and including August 31, 1941.

(7) That each party to this action shall bear his, her or its own costs of suit, including costs on appeal, except that said Metropolitan Trust Company of California shall not bear any of said costs, but shall be entitled to retain said amount of $932.18, heretofore deducted by it from funds on deposit, to cover its fees, expenses and costs.

(8) That said Group No. Two defendants are not entitled to, and shall not receive any interest upon any royalty or sum of money which might otherwise be due or payable to them, or any of them, under said El Segundo Block 31 Community Oil

(Testimony of Martha L. Taylor.)

Landowners Exhibit No. 1—(Continued)

and Gas Lease, and which shall remain unpaid up to and including the date of the entry of this judgment.

Dated: June 9, 1942.

[Signature illegible]
Acting Presiding Judge of the
Superior Court.

[Endorsed]: Filed, June 9-1942 J. F. Moroney, County Clerk By [Illegible] Deputy.

Entered Jun 10 1942 Docketed Jun 11 1942 Book 1255 Page 367 By N. Grey Deputy

[Endorsed]: Filed 12-17-42. Hugh L. Dickson, Referee, CMC.

Cross Examination
(Resumed)

By Mr. Welch:

Q. That check you delivered to Mr. McCray on the 17th of June, do you know what months it was for? A. Well,——

Mr. Dechter: To which we object on the ground the check is the best evidence and speaks for itself.

The Referee: Does the check state what it is for?

Mr. Bowker: No, it does not.

The Referee: Let me see the check.

Mr. McCray: It does not state.

The Witness: No.

Mr. Welch: It was a certified check.

(Testimony of Martha L. Taylor.)

The Referee: They were cashiers checks, weren't they?

Mr. McCray: That is right. They did not state on the checks. They were cashiers checks.

The Referee: They would not state any date.

[13]

Mr. McCray: No.

The Referee: Can you answer that, Miss Taylor? Do you know what months they were for?

The Witness: I think they they were for May, 1941 through February, 1942.

The Referee: From May, 1941 through February, 1942?

The Witness: Yes, I believe that is correct.

The Referee: All right, proceed.

Mr. Welch: As a matter of fact, weren't they for September, October, November, and December of the year, 1941?

A. Well, I believe we held it up——

Q. (Continuing) Up through March 1, 1942?

A. No. As I remember, they were for the May, 1941 royalties through February of 1942 royalties. That is my belief. Iisn't it written on that receipt I have?

The Referee: Where is that receipt that Mr. McCray signed? Here it is right here.

The Witness: It pays them through February, 1942.

Mr. Dechter: The receipt would speak for itself, Your Honor.

Mr. McCray: That is right.

(Testimony of Martha L. Taylor.)

The Referee: It is dated January 17 and is apparently signed by A. A. McCray, payment on one El Segundo Well to landowner up to and including February, 1942, $7,272.68.

Having signed it, the gentleman must have accepted it as written. [14]

Mr. Welch: Yes.

Q. Now that paid up all of the deinquent royalties until the 1st of March, is that right?

A. That is right.

Q. This money you gave to him was in the form of cashiers checks? A. Yes, it was.

Q. Is it not a fact, from September, 1941 that you withheld royalties on the No. 1 Well because of litigation pending in the Superior Court?

Mr. Dechter: To which we object.

Mr. Welch: (Continuing) And that during that time you put this money into cashiers checks which were laid away to be delivered as soon as the litigation was ended?

Mr. Dechter: To which we object on the grounds: First, it is a compound question; and secondly, it is not a proper question on cross examination; and thirdly, there has been no proper foundation laid to qualify this witness to testify along those lines. She is merely a bookkeeper. My examination of this witness was merely to find out if a certain statement was prepared from their records.

The Referee: To my mind there is a fourth objection: It is immaterial. Why she did not pay

(Testimony of Martha L. Taylor.)

it is immaterial. The fact is in evidence she did pay it, and the man accepted it. What difference would it make why she didn't pay it?

Mr. Welch: Well, those were accumulated——

[15]

The Referee: Suppose she were paralyzed and couldn't write and didn't recover the use of her right arm until June when you accepted the money, would it make any difference why she did not pay it?

Mr. Welch: I think so, Your Honor.

The Referee: Why?

Mr. Welch: I think this whole thing turns on whether we waive our right to declare a forfeiture of this lease.

The Referee: Apparently you have when you signed it in June and accepted payment up to March, and you gave no notice of forfeiture. You cannot forfeit a man's right in a lease if it provides for written notice without giving a written notice. Don't you agree with me on that?

Mr. Dechter: That is very true.

The Referee: A lease is a property right which a man has a right to hold.

Mr. Welch: What we want to show is this: We believe that these royalties were all being paid, but they were being held to be delivered on this date, and when the money was delivered it was the day before this bankruptcy was filed, and then upon the assurance the balance of the money would be paid within a day or two.

(Testimony of Martha L. Taylor.)

The Referee: Would that be a legal excuse for your not giving notice of forfeiture?

Mr. Welch: I think so.

The Referee: As a matter of caution, shouldn't you [16] have given a written notice of forfeiture at that time?

Mr. Welch: Under certain circumstances, yes. May I ask to be allowed to file a brief in this case? I think we can show that the law is very plain.

The Referee: I will give you full opportunity to present your case. I will read all of the briefs you want to present.

Are there any other questions?

Mr. Welch: Your Honor, we would like to introduce some evidence.

The Referee: It is now twelve o'clock. Do you want to proceed this afternoon?

Mr. Bowker: Yes, Your Honor.

The Referee: All right, sir, come back here at two o'clock. Do you want this young lady any more?

Mr. Welch: I don't think we will need Miss Taylor any more.

Mr. Dechter: May I pass these books up to the court in the event Your Honor has an opportunity of looking at them during the noon hour?

The Referee: Yes, sir, I will do that. [17]

December 17, 1942
2:00 P. M. Session

The Referee: Proceed, gentlemen. Do you have some evidence you want to put on, Mr. Welch?

Mr. Welch: Yes, if the Court please. I have here a certified copy of a document from the Superior Court, a copy of a Register of Actions for the purpose of showing that this case was pending at all times while these proceedings were going on.

The Referee: What was the nature of the suit in the Superior Court?

Mr. Welch: It was a contest between the landowners as to who was entitled to royalties.

The Referee: Was the validity of the liens in question there?

Mr. McCray: It was an interpleaders' suit.

Mr. Dechter: I don't know myself except there was a question as to how much each of the landowners was entitled to receive under the lease, and the purpose of the suit was to determine what aliquot part each was to receive.

The Referee: Was there any question that the lease had been breached and therefore should have been terminated?

Mr. Dechter: None whatever in that connection.

The Referee: In other words, it was a contest between certain parties who claimed they were entitled to certain receipts from the well?

Mr. Dechter: That is right. The Sovereign Oil Corporation said they had so much money, and it belonged to [18] the landowners, and the landowners claimed it in different amounts and asked the Court to determine how they should be paid. That was only on the No. 1 Well.

The Referee: I do not see how that would affect the question of the rent or even the validity of the lease.

Mr. Welch: It does not, only in this way, if the Court please. I think the rule is that a landowner or lessor waives his right to declare a forfeiture by the acceptance of rent if he has full knowledge of all facts, that is, that the lessee is in default prior to the time that he receives the current rent.

The Referee: Didn't these folks know that the landowners' royalty had not been paid?

Mr. Welch: No, Your Honor. That is the very point. They thought the royalty was being paid at all times into the hands of the Court or into accounts from which it was to be distributed by order of court. They did not know at any time they were in default until the day before this petition in bankruptcy was filed.

The Referee: They believed that the money as it became due was being paid into the Superior Court?

Mr. Welch: Yes, they believed it was being put aside in a separate fund.

The Referee: Well, they did discover, however, it had not been paid the day before this proceeding was begun?

Mr. Welch: That is true. [19]

The Referee: And there has been no declaration of default of this lease since that time?

Mr. Hunt: That is correct, Your Honor.

Mr. Dechter: That is right.

Mr. Welch: Declaration of default? We appeared in court urging that very point, and we stated at that time we would defer exercising any right whatever until our rights were determined under this arrangement.

The Referee: Do you now contend that the lease was in default and should be voided?

Mr. Welch: No, but we contend we have a right to the back rents.

Mr. Dechter: We admit they have——

The Referee: Well, that is admitted.

Mr. Welch: Let me finish.

Mr. Dechter: Pardon me, counsel.

Mr. Welch: We maintain we have a right to the rents from March, April, May and June, and that we have a right to declare forfeiture for their non-payment which we have suspended while this matter was in the hands of the Court. We could not have declared a forfeiture while it was here in court.

The Referee: Do you still adhere to the statement that under the terms of the lease it is necessary to give written notice of cancellation of the lease for any breaches?

Mr. Welch: I think perhaps it is. We have not exer- [20] cised our right yet, but we claim we have not waived our right.

The Referee: Well, if your statement is correct that ninety days' notice is to be given, then you would have ninety days in which to remedy the breach, so you would be in no better position.

I will take that and look it over.

Mr. Bowker: Before we start in here I wonder if I could make a short statement and see if I could get a couple of matters cleared up in my mind. I was not present during the proceedings up until last week, so I am a little unfamiliar as

to what has taken place in the earlier proceedings concerning the arrangement.

I was asked to come in on this one petition with relation to landowners' royalties. I don't know whether I am correct or not, but as I understand it, under the arrangement as proposed herein, and which was confirmed this morning by Your Honor, there is a statement relative to landowners' royalties in that arrangement to the effect:

"Landowners' royalties which carry with them the right of forfeiture of the oil and gas leases under which such royalties are payable and where such right of forfeiture has not, prior to the filing of the petition in bankruptcy, been waived either in writing or by the conduct of the parties, will be paid in full in the same manner as priority claims. Where, however, the facts disclose that prior to [21] the filing of the proceedings hereunder by the debtor, the landowners, by writing or by their conduct, have legally waived the right of forfeiture as to any of the unpaid royalties, the same will be treated the same as those in the class of unsecured creditors. Should any controversy arise as to the proper status of such claims of holders of landowners' royalties, the same shall be determined by the above entitled Court in the above entitled proceeding upon hearing after notice."

That was the arrangement under the plan. Then the notice was served and on the Order to Show Cause along the same line, that the only question to be determined before this Court was whether or not the landowners, by their conduct or in writ-

ing, ever waived their right to declare forfeiture for those months which the landowners' royalty is now due and owing. There is no controversy that there is certain money owing. I feel at this time that we are not coming in here to declare a forfeiture in this Court or to ask a forfeiture. It is only a question of whether we have waived our right.

The Referee: By the acceptance of these subsequent rents?

Mr. Bowker: By the acceptance of the rent, that is correct.

Mr. Dechter: We agree with that issue, Your Honor.

Mr. Bowker: If I am right there, then, as I say, [22] Your Honor, I was not present at these proceedings. Mr. McCray, who is one of the landowners, has been present from the outset, but it is my understanding when the proceedings were first commenced there was an Order to Show Cause served on the landowners and a hearing had in order to determine their status. I may stand corrected in this, I may be in error, but it is my understanding that Your Honor made an order setting it off calendar and informed the landowners that this matter would be taken up at a later time in this proceeding, and that that would not be prejudicing their rights in any way under the lease until they had been heard in court. Now that may be an erroneous statement, Your Honor.

The Referee: But no word or act of mine was given to authorize the acceptance of any rent.

Mr. Bowker: No, I didn't mean that.

The Referee: I merely said there would not be any prejudice to anyone by the delay, and I still stand on that statement.

Mr. Bowker: Yes, Your Honor.

The Referee: If they accepted rents after that time, that is another matter.

Mr. Bowker: Then as far as your point is concerned, as far as our proof of claim is concerned which we filed in this matter, of course it wasn't filed as a secured *ot* unsecured claim. We merely set forth the facts relative to [23] the lease and we know certain money was owing to us, and we thought that would be a vehicle—we had to have that vehicle to bring us before Your Honor, because we expect Your Honor to determine in this hearing whether or not we are secured or unsecured.

So with those few statements in mind, I will close. That was my opinion, in other words, as to the reason for this hearing.

The Referee: All right, anything further?

Mr. Dechter: It is our contention, Your Honor, that the landowners did not have to accept the rents if they wanted to rely upon their right of forfeiture. We contend they waived the right of forfeiture by their acts and conduct, both before and since the filing of the bankruptcy petition, by accepting royalty checks after they were due and prior to the filing of the bankruptcy petition, and by accepting royalty checks subsequent to the *filing* of the bankruptcy petition from the Receiver.

The Referee: When was this petition filed, Mr. Dechter?

Mr. Dechter: I think it was filed June 19, Your Honor.

The Referee: The Bank of America checks were issued June 17.

Mr. Dechter: That is right. There were checks issued before then, Your Honor, in January, February, March, and in June. Then there were checks issued in July, August, September, and October.

[24]

In the American Precision Machinery case, which was before Your Honor, the landowner in that case contended he had the right of forfeiture, and the evidence showed after the filing of the bankruptcy proceding he accepted checks.

The Referee: I remember that.

Mr. Dechter: I found even a later California case in addition to the two cases I gave to Your Honor this noon. It is Keating vs. Preston, 42 Cal. Appellate, 2nd Series, page 110.

The Referee: All right.

Mr. Dechter: At page 121 the Court says, "The authorities are uniform to the effect that the forfeiture of a lease for breach of covenant with full knowledge thereof on the part of the lessor is waived by the acceptance of rent which accrues after the breach."

The Referee: That sounds pretty good.

Mr. Dechter: "The present case is a clear example of circumstances under which a landlord is estopped from terminating a lease after use of the

premises contrary to an implied covenant by demanding and receiving rent which accrued after the asserted breach, with full knowledge of the illegal use of the property. This does not mean that the lease might not be forfeited by a subsequent similar breach after the waiver occurred. That situation, however, is not involved in this suit."

In other words, we have a situation here where they [25] knew there was a breach by reason of the failure to pay the rents in March, April, May, and June, and they accepted these checks subsequent to that time with knowledge of that particular breach.

The Referee: All right.

Mr. Hunt: If Your Honor please, there are some other cases. May I submit a memorandum?

The Referee: Yes, gentlemen, I am going to take this matter under submission and give you all a chance to give your authorities.

Mr. Dechter: I might state in connection with counsel's request for time to file a memorandum of authorities, I asked that a meeting be held in my office, which meeting was held for the purpose of trying to stipulate to what the facts were, and in attempting to see whether or not we could agree on what the law was, and if we could not stipulate to the facts we would submit it to Your Honor. At that time I told counsel who were present, and Mr. McCray, the law upon which Mr. Hunt and I were relying, so it is not as if they were unprepared to meet the issues.

The Referee: All right. Mr. Welch, that case

you cited does not touch this question at all. It says classification of claims should not be arbitrary or unjust so as to cause an injustice.

Mr. McCray: May I say something in this connection?

The Referee: That case does not touch the question of [26] the landowners.

Mr. McCray: I seem to be the butt of all this thing.

The Referee: What is that?

Mr. McCray: First of all, there is one issue before the Court.

Mr. Dechter: Is Mr. McCray an attorney?

Mr. McCray: No, I am not.

Mr. Dechter: Your Honor, Mr. McCray is represented by counsel. He should speak through his attorney.

The Referee: Well, let us hear what he has to say.

Mr. McCray: One question before the Court here is whether we have waived our rights of forfeiture prior to the filing of the bankruptcy. Under the plan, which was confirmed by the Court this morning, the specific wording says, "Landowners' royalties which carry with them the right of forfeiture of the oil and gas leases under which such royalties are payable, and where such right of forfeiture has not, prior to the filing of the petition in bankruptcy,"—that seems to be the issue as far as I can see it when the plan was confirmed.

The Referee: "Has not been waived prior," isn't that what it says?

Mr. McCray: Yes, "has not prior to the filing of the petition in bankruptcy been waived either in writing or by the conduct of the parties, will be paid in full in the same manner as priority claims."

[27]

The Referee: There is your limitation, if it has not been waived either in writing or by conduct.

Mr. McCray: Now to prove we have waived that right prior to the petition in bankruptcy and whatever they did after the bankruptcy has nothing to do with the case.

Mr. Dechter: He fails to read the sentence immediately following, "Should any controversy arise as to the proper status of such claims the holders of landowners' royalties, the same shall be determined by the above entitled court in the above entitled proceeding." In other words, all this plan says if somebody is a secured creditor he will be paid in full. The present proceeding has nothing to do with the plan. It is brought up on proper petition and Order to Show Cause. They have been served, and the issues are raised by that petition.

The Referee: That plan very definitely says if the right to forfeit has not been waived prior to bankruptcy, either by conduct or in writing. Now, they contend your acceptance of the checks on the 17th was such conduct that waived your right to forfeiture.

Mr. McCray: We want to prove, and I think we can show that prior to the acceptance of those checks of June 17th, payment of royalties was due

under a judgment, and it was purely a case of interpleader.

The Referee: If your statement is correct there, it was a contention between certain parties as to who was [28] entitled to which royalties, is that right?

Mr. McCray: That is right.

The Referee: Now, then, the company said, "We are merely a stakeholder."

Mr. McCray: That is right.

The Referee: "We have no interest in this, therefore, we intervene and pay the money to the Court, and let it be paid by the Court to whomever is determined to be entitled to it." Isn't that what the situation was?

Mr. McCray: That is right, except the money was not paid into the Court.

The Referee: Well, I was told by someone that it was a sizeable sum that was paid by the Court.

Mr. McCray: No, it wasn't paid by the Court.

The Referee: Does the Court still have that money?

Mr. McCray: No, Your Honor. The Sovereign Oil Corporation had placed the money in the hands of the Metropolitan Trust Company for a period of several months after the judgment was reversed, reversing the decision in the Superior Court, then the Sovereign Oil Corporation acted as stakeholder on the balance of the money. The Metropolitan Trust Company on the filing of the final judgment paid over the sum and the Sovereign Oil Company had represented to me that they had the full amount

of money up until the date of judgment, two days before this filing of the petition in bankruptcy.

They say, "This is all we have. Here is the money, and [29] we will pay you the balance of the money within two weeks as soon as we get some money from the Standard Oil Company. But this is all we have, and we are paying up to March 1."

The question of that royalty was all paid on No. 1 Well. The reason for that was this: Mr. Cooney said they wanted to get that out of the way before they got into this litigation, and under the plan of arrangement the landowners were going to be paid in full, the National Supply Company, the principal creditor of the Sovereign Oil Corporation, and that that was on No. 1 Well and they would see the royalty would be paid in full.

Then Mr. Cooney was appointed Receiver, and he came to see me several times. He said, "I find out now we cannot pay you the back royalty right away, but will you give us a couple of months? I can pay it in two or three months. I would like to see that it is paid."

I have known Mr. Cooney for a number of years. I have taken the man for his word. If a friend of mine is in financial difficulty I don't immediately serve him with a notice of default and tell him he has to go into bankruptcy. He said the plan to be worked out under bankruptcy was a plan for the insolvent corporation to work out their own affairs and to give them a little time, and they would see we would be paid in full, and that under the plan they intended to buy out the corporation

themselves. After he got into it he finally determined that it probably was not [30] advisable to buy the corporation.

They led me to believe and told me right along, —Mr. Cooney, the manager of the Sovereign Oil Corporation said, "The very first thing we are going to do is to pay those back royalties." Under the plan they were going to do several things. First of all, they were going to pay landowners' royalties.

I received those checks from Miss Taylor. Mr. Cooney was there. I said, "What is this balance?"

He said, "Here is what we are going to do, pay your current and back royalties, and I will see that you get your current and back royalties in several months."

Now they say we come in and waive our rights.

Mr. Hunt: I want to be heard against these charges, if Your Honor please. Mr. Cooney is not a lawyer. He did a good job, and did it without any charge. It may be true what he told these gentlemen, but he told me about it, too, as he should have done. I was his attorney, and I said, "No, you cannot do that. You cannot make any promises as to what you are going to do unless it is backed up by an order of court. You cannot make any promises. The Court has the last say."

The Referee: I realize that.

Mr. McCray: Excuse me, Your Honor, I am not making any charges.

Mr. Hunt: Just a minute. [31]

Mr. McCray: All right.

Mr. Hunt: You have made these charges.

Mr. McCray: That is not a charge, I want to correct that statement.

Mr. Hunt: He made a statement he could pay them, but I said he could not unless the Court authorized it.

The Referee: I appreciate what you say, Mr. Hunt.

Mr. Hunt: So he stopped making any further representations.

The Referee: I know Mr. Cooney and I recognize his ability, and I think he is a sincere and honest man. He told you what he honestly believed he had a right to do or could do. I don't think he intended to deceive you. However, as Mr. Hunt says, it is necessary to obtain leave of Court before anything is done so as to make it legal and proper.

Mr. McCray: May I say one more thing there, Your Honor?

The Referee: Yes, sir.

Mr. McCray: I didn't mean to interfere or make any charges against Mr. Cooney.

The Referee: I appreciate that.

Mr. McCray: I wanted to show that I did what a reasonable man would do. I took him at his word that he would see it would be paid. Then he found out he couldn't. But by my conduct I did not waive my right. I did what any [32] reasonable man would do under the circumstances. I knew we could have gone ahead and thrown them into bankruptcy right now.

Mr. Dechter: There is nothing detrimental or

derogatory as to what Mr. McCray did. We all do things of that kind. The law says you can rely upon a person's credit or you can rely upon your security. If he wanted to rely solely upon the right of forfeiture he would not have given any further time.

The Referee: Well, the whole thing is comparable to this. I give a man my note, and within a certain number of years after the due date he must sue on it. If he is lulled into a sense of security by my oral promises that I will pay him, and if he lets the Statute run, then he is out, that is all. He is just a victim of circumstances unless I extend it in writing.

Mr. Hunt: One thing further I would like to call to Your Honor's attention. These claims filed by Mr. McCray are in the ordinary form which are filed by unsecured creditors.

The Referee: That is true.

Mr. Hunt: They are just on the ordinary form.

Mr. Dechter: They don't state they have any security.

Mr. Bowker: We state the rights under the leases.

Mr. Dechter: You state you have so much money due you, that is all. [33]

Mr. Bowker: By reason of the aforementioned lease.

Mr. Hunt: The point is if you reserved other rights you claim under the lease, that would be different, but you did not; you merely filed an ordinary claim, filed by an unsecured creditor.

Mr. Welch: I would like to call attention to the fact the plan of arrangements cuts off all that.

The Referee: Cuts off what?

Mr. Welch: Any claim, that by filing a claim or by accepting rents, we jeopardize our rights. It says anything prior to that, prior to the adjudication.

Mr. Dechter: The Receiver represents creditors as well as the debtor, and the rights of creditors cannot be taken away when the Receiver takes over the business and manages it and pays the rents, and if the people have a right of forfeiture, that is not taken away by the Bankruptcy Court.

The Referee: I realize that.

Mr. Dechted: The landlord can come in and say, "I want my rent or forfeiture." All this Court can do then is say, "I will give you a reasonable time, but I cannot take your rights away."

The Referee: I have had any number come in here on that very thing.

Mr. Bowker: Under this arrangement, this is a plan of arrangement, and not an adjudication in bankruptcy, and under the plan as Mr. McCray pointed out, in the master plan [34] and also in the petition for the determination of our rights and status as landowners, they say specifically:

"At the time of the commencement of the bankruptcy, certain royalties known as landowners' royalties," I am reading from their petition for determination of our status, "had accumulated and were unpaid in favor of the lessors under said leases, commonly known as landowners, in a sum ag-

gregating several thousand dollars. Under the provisions of this revised arrangement, it is provided that these accumulative landowners' royalties shall be paid in full, in cash, unless the facts disclose that such landowners did by their conduct prior to bankruptcy waive any forfeiture rights they had''—

In other words, did by their conduct prior to bankruptcy——

The Referee: This is June 17?

Mr. Dechter: You, Your Honor, June 19.

Mr. Bowker: June 19—did by our actions prior to June 19, 1942, we could read in there—

"... did by their conduct prior to bankruptcy waive any forfeiture rights they had under their leases to forfeit the same by reason of such nonpayment of landowners' royalties."

In other words, by the arrangement and by their petition herein they have brought us into court with the impression that the only conduct they were relying upon was our conduct prior to the time this matter came under Your Honor's juris- [35] diction.

The Referee: According to your contention they nail it down to the payments you accepted on June 19.

Mr. Bowker: That is correct, Your Honor. That was our assumption. Then they go on and say, "It now appears that, prior to bankruptcy,"—in other words, still prior to bankruptcy—"the landowners, after breaches of the conditions of their leases covering said wells accepted royalties under said leases from the debtor corporation with full knowledge

of all the facts and have been precluded thereby from enforcing any rights of forfeiture arising out of such non-payment, and are relegated to the status of general creditors herein with respect to such unpaid royalties."

In other words, they are basing under this plan of arrangement by the Sovereign Oil Corporation and the Receiver herein, by their very own petition and by the arrangement itself, they have stated these acts or conduct must have occurred prior to the time this matter came under Your Honor's jurisdiction. Therefore, we maintain the only matter before Your Honor is whether the landowners, prior to June 19, 1942, waived any of their rights to forfeit those rents by their conduct, and anything that happened subsequent thereto by reason of the cashing of this check is not before this Court today.

The Referee: Wasn't June 19 the day on which they took [36] these Bank of America cashiers checks?

Mr. Bowker: It was June 17, your Honor. June 19, I believe, they filed their petition.

Mr. Dechter: Counsel does not read further in the petition, as follows:

"In connection with the administration of the Debtor's estate and the consummation of said revised plan of arrangement, it is necessary that the status and rights of holders of said unpaid landowners' royalties under said leases, arising since the commencement of this bankruptcy proceeding have been paid."

Now, we are here to ask this Court to determine what that status is. We contend that that status is that of an unsecured creditor, because of acceptances of landowners' royalties after they were due, both before and after bankruptcy. In other words, they accepted these landowners royalties after they were due from the debtor; they accepted them after bankruptcy from the Receiver.

The Referee: Wouldn't one be sufficient?

Mr. Dechter: Certainly, Your Honor. In other words, they cannot rely upon some allegation that it is merely a conclusion. Here are the facts as they are disclosed to this Court, and this Court will draw its own conclusion. [37]

The Referee: It seems to me the crux of the whole thing is: Did you waive your right when you accepted these Bank of America cashiers checks on June 17?

Mr. Dechter: Exactly, Your Honor.

Mr. Bowker: That is right. We will stand on that, Your Honor. I think that is the question .

The Referee: Now do you want to introduce some testimony, any further testimony, or do you want a couple of days to brief this matter.

Mr. Welch: We have a witness.

The Referee: If we are agreed that is the fact, I don't see that any further testimony is necessary.

Mr. Welch: I think the whole gist of the case is contained in the proceedings so far, but we would like to introduce some evidence.

The Referee: All right, proceed. [38]

WILLIAM H. RAMSAUR

called as a witness on his own behalf, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Welch:

Q. Mr. Ramsaur, you are one of the committee elected by the landowners who leased the land upon which No. 1 well is located? A. I am.

Q. And you were authorized by them to act in their behalf in regard to collecting royalties, and so on? A. Yes, sir.

Q. You received the royalties prior to September 19, 1941?

A. After the decision of the Superior Court in our favor, what had accrued on No. 1, the Sovereign paid direct to this committee.

Q. What oil company?

A. The Sovereign Oil Corporation. When the reversal came from the Supreme Court we received no more money, and we understood they were being impounded.

Mr. Dechter: We move to strike out what the witness understood as a conclusion.

The Referee: Yes.

The Witness: What is that? [39]

The Referee: Tell us what you were told, not what you understood. Tell us what you were told by someone in authority as to payments. Did anybody tell you that the payments were not being made by the Sovereign Oil Corporation because of

(Testimony of William H. Ramsaur)

a reversal in the Supreme Court and that the money would be impounded by the Court?

The Witness: Yes. The Sovereign, according to the information we have from them——

Mr. Dechter: I can't hear you, Mr. Ramsaur.

The Witness: According to the Sovereign Oil Corporation the money was being placed in a separate fund to be paid on the determination, the final determination of this lawsuit.

The Referee: Who told you that?

The Witness: My attorney.

Mr. Dechter: We move to strike that as hearsay, Your Honor.

The Witness: He got it from them.

The Referee: I know, but that is secondhand.

Mr. Welch: Q. Did you ever call at the Sovereign Oil Corporation after this decision came down, the office of the Sovereign Oil Corporation?

A. No, I did not.

Q. You were not there, personally?

A. No.

Q. Did you have any knowledge of the fact that the [40] Sovereign Oil Corporation was in default on the payment of monthly royalties?

Mr. Dechter: To which we object on the ground it calls for a conclusion. He can ask whether or not he received his royalty.

The Referee: Yes, the better question would be to ask him if he received it. If he says he did not, it inevitably follows they were in default as far as he was concerned.

(Testimony of William H. Ramsaur)

Mr. Welch: All right, Your Honor.

The Referee: In other words, did you get your money as you should have gotten it under the terms of your lease?

The Witness: We shouldn't have gotten it because the Court held up the Court's order——

Mr. Dechter: Just a moment. We move to strike that as a conclusion of the witness.

The Referee: You had better ask him the questions yourself. I give up.

Mr. Hunt: The point is, he did not get it.

The Referee: I think that is conceded.

Mr. Welch: What is that, Your Honor?

The Referee: I think everybody concedes he did not get it.

Mr. Welch: What I want to do is show he had no knowledge they were in default and had no right to exercise his right of forfeiture.

Mr. Dechter: That is what the Court has to decide. If [41] this witness could decide that question we would not need the Court.

Mr. Welch: It is a matter of knowledge.

The Referee: You can ask what the facts were.

Mr. Welch: Q. Did you know from any source that the Sovereign Oil Corporation was in default?

A. No.

Mr. Dechter: To which we object upon the ground it calls for a conclusion of the witness.

The Referee: That is true. As I understand your answer, you did not know they had ceased paying the royalties. Is that what you mean?

(Testimony of William H. Ramsaur)

The Witness: Into some fund, yes.

The Referee: Into some fund?

The Witness: It was to be paid out later upon final determination of the Court, upon the final determination of the suit.

Mr. Welch: Q. When did you first learn they were in default for the March, April, May, and June payments?

A. Well, I didn't know it until after they had gone into bankruptcy, because Mr. McCray got that check and I didn't get the information until several days later that they hadn't paid in full.

Mr. Welch: I think that is all.

The Referee: Let me ask a question.

The Witness: Yes, sir. [42]

The Referee: Was Mr. McCray authorized to act for you or for any committee? Did you authorize him to act for you in the matter of collecting your royalties?

The Witness: I asked him to try and secure the royalties so that when this case was settled we could divide the money according to the Court decision.

Mr. Welch: Q. Mr. McCray was a member of the committee with you, wasn't he?

A. Yet's see. No, not at that time. Was he? There were two groups of defendants here by the Sovereign, Group No. 1 and Group No. 2. Mr. McCray represented Group No. 2 and I was chairman of the committee for Group No. 1. Through the attorney's office Mr. McCray was authorized to try

(Testimony of William H. Ramsaur)

to secure this money and have it put into a fund so that it would be available at the time.

Mr. Welch: That is all.

The Referee: Any other questions?

Cross Examination

By Mr. Dechter:

Q. Mr. Ramsaur, you knew, did you not, that you yourself had not received any royalty on June 7, 1942 for a period of at least eight or nine months?

A. Well, we weren't to receive any from the oil company after this reversal of the Court decision.

Q. That was about December of 19—— [43]

A. (Interrupting): Oh, it was over a year.

Q. Over a year?

A. Yes. The Court's decision was a reversal, and they would not pay the money to anyone.

Q. I show you Receiver's Exhibit B, Mr. Ramsaur, which is a receipt dated June 17, 1942, signed by A. A. McCray, and in which he acknowledges receipt of check No. 417340 of the Union Bank and Trust Company in favor of A. A. McCray, William Ramsaur, and F. R. C. Fenton for $4,016.77. Are you the William Ramsaur that is mentioned in that check? A. I am.

Q. Did Mr. McCray deliver your share of the proceeds of that check?

A That was not the way it was done.

Q. Did you get any portion of the proceeds of that check?

(Testimony of William H. Ramsaur)

A. After, along towards the last of June, yes.

Q. Was it about June 17, 1942?

A. No, it was in the latter part of June, quite a bit after that. In fact, I didn't know this check was paid until several days later.

Q. But you did get a portion of that check, did you not? A. Later on, yes.

Q. How much was that payment?

A. My portion?

Q. Yes. [43a]

A. That is hard to say.

Q. Well, approximately?

A. Well, I suppose about $150.00, something like that.

Q. At the time you received that check you knew that check was not in full for royalty up until June, did you not?

A. Why, certainly, but I didn't get it until way after the——

Q. Just a moment. And you knew that check did not include royalty that was owning to you and the other landowners for March, April, May, and June, 1942, did you not?

A. At what time?

Q. When you got your portion of this money?

A. The last of June, yes.

Mr. Dechter: That is all.

The Referee: Any other questions?

Mr. Welch: That is all.

The Referee: All right. If there are no other questions from this witness, he may step aside.

Mr. Bowker: I will call Mr. McCray. [44]

ALLAN A. McCRAY,

called as a witness on his own behalf, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bowker:

Q. Mr. McCray, you are an officer of the Edlou Corporation? A. Yes, I am.

Q. The Edlou Corporation is one of the landowners in No. 1 Well? A. Yes.

Q. Is the Edlou Corporation a landowner in No. 2 Well? A. Yes.

Q. Is the Edlou Corporation a landowner in No. 4 Well? A. Yes.

Q. Mr. McCray, are you also an officer of the Elsie Oil Company?

A. I was until the dissolution of the Elsie Oil Company in 1940.

Q. Subsequent to the dissolution of the Elsie Oil Company in 1940, was there distributed to you portions of interest in these leases, No. 2 and 4?

A. Yes, there were.

Q. Now, Mr. McCray, I will ask you if during or at any time during the spring of 1942, if you called on any of the [45] officers of the Sovereign Oil Company? A. Yes, I did.

Q. Can you recall specifically, Mr. McCray, about what date it was when you made one of your first visits, or approximately, to the best of your recollection?

A. Well, it was some time in April.

Q. Some time in April, 1942, is that correct?

A. That is correct.

(Testimony of Allan A. McCray.)

Q. Whom did you talk to at that time?

A. I talked to Mr. Smith, president of the Sovereign Oil Corporation.

Q. Was there anyone else present?

A. I don't recall at the first visit. I think Miss Taylor was in the outer office. I talked with Mr. Smith.

Q. What did you discussion relate to, Mr. McCray? Tell the Court in your own words what the essence of the discussion was, what you said and what Mr. Smith said relative to this particular problem of payments of oil royalties.

A. Well, I asked Mr. Smith what was the reason the royalties had not been forthcoming on various wells at El Segundo. He apologized and said they were not forthcoming because of the fact the oil had been sold to the Triangle Refining Company, and the Triangle Refining Company had been slow in paying them, and that they would get the checks within a very short time from the Triangle Refining Company [46] and would then pay us our royalties.

Q. Was the question brought up at that time, Mr. McCray, relative to any moneys impounded by reason of a lawsuit?

A. Yes. I don't know if it was specifically at that time, but I asked subsequently.

Q. Well, at that time was anything said?

A. I don't recall at that particular time.

Q. Do you recall a subsequent visit to their office? A. Yes.

(Testimony of Allan A. McCray.)

Q. Well, when was that subsequently?

A. Well, that was later on in April, and I made several visits in May.

Q. Later on in April was anything said about this money impounded or any money impounded or anything relative to a lawsuit?

A. Yes. I asked Miss Taylor later on where the money was going, and she said the money the Sovereign had for current royalty was being put into a separate fund. Later on, Mr. Cooney assured me that the money for the No. 1 Well was being put in a separate fund until the final determination of that lawsuit, as to whether Group No. 1 was to get it or Group No. 2 was going to get it.

Q. In other words, he assured you, then, that the royalties were being placed in a separate account for your benefit? [47]

A. That is right.

Q. For the benefit of the landowners of Well No. 1? A. That is right.

Q. And that the landowners would get it as soon as a Court decision was rendered, is that right?

A. That is right.

Mr. Bowker: Your Honor, may I have the Exhibit relative to the judgment in this case?

The Referee: The Clerk has it. * * *

Mr. Bowker: Q. Mr. McCray, I show you a copy of a judgment entitled, Sovereign Oil Corporation versus F. R. C. Fenton, et al., and so forth, and ask you if you are connected with the Edlou Company named there, if you were the secretary of that company? A. Yes, I am.

(Testimony of Allan A. McCray.)

Q. You are familiar with this lawsuit?

A. Yes, I am.

Mr. Bowker: The record shows here that the judgment was signed on June 9, 1942.

The Referee: It is a Superior Court judgment, is that right?

Mr. Bowker: Yes, Your Honor, it is a Superior Court judgment. I was one of the attorneys in the case.

The Referee: What about the time for appeal?

Mr. Bowker: The time for appeal has lapsed, and no appeal has been taken. [48]

I might state, Your Honor, that I was one of the attorneys in that case which was first tried in the Superior Court and sent up and was then reversed, and sent to the Appellate Court, and the Appellate Court reversed the Superior Court and sent it back to the trial court for a new trial. At that time there was a compromise between the parties to the interpleader. A stipulation of compromise was filed, and this judgment was based upon that compromise. So this is the judgment.

The Referee: All right.

Mr. Bowker: Q. Now, Mr. McCray, were you notified by your attorneys that there was a judgment entered on June 9, 1942 in this case?

A. Yes, I was.

Q. Thereafter, did you go down to the Sovereign Oil Corporation offices? A. Yes, I did.

Q. Do you remember the approximate date?

A. It was around June 11 or 12.

Q. Do you remember who was present at that time?

(Testimony of Allan A. McCray.)

A. Miss Taylor was present at that time.

Q. Anybody else?

A. And Mr. Cooney, I believe.

Q. Did you at that time request that the money be paid? A. Yes, I did.

Q. What was said by the parties relative to the payment [49] of money at that time?

A. The Sovereign were waiting to hear from—that they had to hold a meeting of the Board of Directors of the Sovereign Oil Corporation, and that they had to get word from their attorney before they could pay out the money.

Q. All right.

A. They wanted to be sure the judgment was entered and would not pay out the money to anyone unless in accordance with court instructions, and they had not received proper word from their attorney to pay the money out.

Q. At that time, Mr. McCray, did they inform you they had all the money that was due and owing?

Mr. Dechter: We object to counsel leading the witness. The witness can take care of himself.

The Referee: You might as well testify yourself, counsel, as to ask leading questions. Just ask him what was said.

Mr. Bowker: All right, Your Honor.

Q. What was said at that time, Mr. McCray?

A. I think I told you substantially what was said, Mr. Bowker.

Mr. Bowker: All right.

The Referee: Is it not a fact you went there

(Testimony of Allan A. McCray.)

and asked for your money and they told you they would not pay it out because of lack of knowledge of the finality of this judg- [50] ment.

The Witness: Yes.

The Referee: Then some time later you accepted these Bank of America cashiers checks?

The Witness: That is right.

Mr. Bowker: Q. Now, Mr. McCray, at the time you accepted the Bank of America cashiers checks, what was the discussion at that time?

A. I asked them at that time, I said, "Well, these checks only pay up to March 1. Where is the royalty payable up to the month of March and April?" The May royalty would not become due until June 20 under the lease.

They said, "Well, we don't have the money on hand. The money is not on hand." But they had it in the form of cashiers checks which they turned over to me up to March 1.

Mr. Cooney said, "Well, in a very short time we will be getting the check from the Standard Oil Company on the sale of our oil. It will be around the 20th of June. We will get a check for approximately $7700.00, and when we get that check, we have some operating expenses, and we can use a greater portion of that check to clear up the balance of the royalty on your well."

Q. When was it first brought to your attention, Mr. McCray, that the Sovereign Oil Corporation did not have all of the funds on hand to make the payments through May of 1942? [51]

(Testimony of Allan A. McCray.)

A. The first definite evidence I had was when they told me they did not have any more, and that is all they could pay me was to pay to March 1, and that was right around June 17 when I received the money from that.

Mr. Bowker: That is all, Your Honor.

Cross Examination

By Mr. Dechter:

Q. Calling your attention to the last conversation when you asked them what about the checks for the royalties for March and April when they gave you the cashiers checks which you receipted on Receiver's Exhibit 3? You referred to the royalties shown on Receiver's Exhibit 1 for March, $813.61, and April, $630.59, did you not?

A. That is right.

Q. Now you were also a landowner on Wells No. 2 and 4, is that right? A. That is right.

Q. Showing you portions of Receiver's Exhibit 2, consisting of a series of checks, I will show you check No. 8054, dated March 20, 1942, for $44.38, being 2% override, December, 1941.

You received that check, did you not?

A. Yes, I did.

Q. That bears your endorsement on the back?

A. That is right. [52]

Q. At that particular time you had not been paid, had you, for the royalty for January and February, is that correct?

A. What well are you talking about?

(Testimony of Allan A. McCray.)

Q. This check I am showing to you now, you got a check which said, 2% override royalty, December, 1941, Community No. 2 well.

A. That is right.

Q. At that time when you received that check for $44.38, there was owing to you the royalty for January and February? A. That is right.

Q. And you received that check when you knew that you had not received that royalty for January and February, did you not?

A. That is right.

Q. Now I will show you another check dated March 20, 1942, No. 8053 made out to the Bank of America for $369.85, "One-sixth royalty, December, 1941, Community No. 2." You were a landowner in that well, also? A. That is right.

Q. You participated in the distribution received by the Bank of America? A. Yes, sir.

Q. On March 20, or thereabouts, when you received the distribution of that share, you knew the royalty for [53] January and February had not been paid by the Sovereign Oil Corporation, did you not?

A. That is right.

Q. Community No. 2 Well is which one, is that Sovereign No. 2 Well?

A. I get twisted on these names. Community No. 2 is Sovereign No. 2, that is right.

Q. And Elsie No. 2 is Sovereign No. 4, is that right? A That is right.

Q. Showing you another check, Mr. McCray, No. 8055, dated March 20, 1942, made out to the Bank of

(Testimony of Allan A. McCray.)

America for $272.36, with the notation "Elsie No. 2, one one-sixth royalty, December, 1941," you received your share of that participation, also?

A. That is right.

Q. At the time you received your share of that distribution you knew the January and February royalty had not been paid, did you not?

A. That is right.

Q. Now, calling your attention to another check dated March 20, 1942, No. 8056, made out to A. A. McCray, Trustee, for $115.33, with the notation "Elsie No. 2 Well, December, 1941, 2% override royalty," you received and cashed that check, did you not? A. That is right.

Q. You knew at the time you cashed that check the over- [54] riding royalty to you on Sovereign Well No. 4 had not been paid for January and February, 1942, did you not?

A. That is right.

Q. Showing you a number of checks, Mr. McCray, made out on all these three wells, starting with August, 1942 down to October, 1942——

Mr. Bowker: If Your Honor please, I would like to offer an objection on that.

Mr. Dechter: May I finish my question, please?

Mr. Bowker: Excuse me, counsel.

Mr. Dechter: (Continuing) Q. You received your share of those checks, did you not?

A. These checks?

Mr. Bowker: Your Honor, I will offer my objection to that question on the grounds it is immaterial

(Testimony of Allan A. McCray.)

and irrelevant to this issue, inasmuch as those checks were received subsequent to the appointment of the receiver, and are not before this Court.

The Referee: It shows the conduct. I will overrule the objection.

You got the money from the Receiver right along, didn't you?

The Witness: Yes, Your Honor.

Mr. Dechter: Q. At the time you received that money from the Receiver you knew the royalty on No. 1 Well from March to the first eighteen days of June had not been paid? [55]

A. Yes, that is right.

Q. You knew the royalty from January to June 18 of 1942 on Sovereign Well No. 2 had not been paid? A. At what time?

Q. At the time you received the checks from the Receiver for current landowners' overriding royalties.

A. Well, I received the checks from the Receiver, Mr. Dechter, over a period of several months, and during several months of receivership, I found out what months they were unpaid on and was able to determine how much was owing. It was not right after the receivership. It was a period of five or six months I received checks from the Receiver.

Q. Whenever you received checks from the Receiver, there was a notation on them showing what it was for, is that right? A. Yes, that is right.

Q. The first check you received from the Receiver was paid on August 17, 1942 for $270.84

(Testimony of Allan A. McCray.)

which recited it was on El Segundo No. 1 Well, landowners' royalty for June, 1942, did it not?

A. Yes.

Q. When you received that check you knew the landowners' royalty up until June 18 had not been paid to you? A. That is right.

Q. That was true on all subsequent checks, is that right? [56] A. Yes, that is right.

Q. In other words, each one of these checks showed for what month the royalty was paid?

A. That is right.

Q. The next check you received was royalty for July, 1942? A. That is right.

Q. At that time you also knew the royalty for the months from January to June 18 had not been paid? A. At what time?

Q. When you cashed the check from the Receiver dated August 17, 1942, the $669.73, with the notation, "El Segundo No. 1 Well, 16 2/3 royalty, July, 1942."

A. No. As I said before, I didn't know for what months until later on, after I had received several months. I think August was the second month's check received from the Receiver.

Q. Do you mean to say these notations on the checks showing what the checks were for were not on them when you received them?

A. No, I didn't say that.

Q. All right.

A. I say I didn't know for what specific months royalty was owed on No. 2 Well and No. 4 Well

(Testimony of Allan A. McCray.)

until I had received several of these checks. I didn't at any particular time until I had received a lot of these checks. [57]

Q. After the Receiver was appointed in this matter you knew you had not received royalties on Well No. 1 from March to June 18, 1942?

A. Yes, I did.

Q. After the Receiver was appointed, you knew you had not received royalties on Well No. 2 from January to June 18, 1942? A. That is correct.

Q. After the Receiver was appointed, you knew you had not received royalties on Well No. 4 from January to June 18, 1942? A. That is right.

Q. When you received these checks from the Receiver, these notations as to what they were for were on there, were they not?

A. Yes, they were.

Mr. Dechter: That is all.

The Referee: Any other questions, gentlemen?

Mr. Bowker: No questions, Your Honor.

Mr. Welch: No questions.

The Referee: Is there any further testimony, gentlemen?

Mr. Welch: I have a copy of the Register of Actions which I would like to introduce.

Mr. Dechter: I cannot see the materiality of it, Your Honor.

The Referee: I don't know what it is. [58]

Mr. Welch: It is a Register of Actions of the Sovereign Oil Corporation against landowners.

The Referee: Have you the final judgment here?

Mr. Welch: Yes, Your Honor, but this is for the purpose of showing it was pending.

Mr. Dechter: It shows a lot of entries up until 1939, and then there is a hiatus. In 1942 there is a stipulated compromise judgment. I don't see what bearing it has, Your Honor.

Mr. Welch: Except it is stipulated this case was pending, and this money was being held under order of court.

The Referee: As I see it, it would merely be cumulative. The case was tried and reversed, appealed, and sent back.

Mr. Welch: Very well, it would be cumulative.

The Referee: In other words, why gild the lily?

Mr. Welch: Very well, Your Honor.

The Referee: Now what is the next bit of proof you have to offer?

Mr. Dechter: The Receiver rests in this matter.

The Referee: Now, you gentlemen will want to present briefs.

Mr. Welch: We would like to do that within a day or two.

The Referee: Serve a copy on Mr. Dechter.

Mr. Welch: I shall be glad to do that, Your Honor.

The Referee: Anything further, gentlemen?

Mr. Hunt: No, Your Honor. There are three other matters [59] that must be attended to in connection with this hearing today. The first matter is that of the Receiver's report.

The Referee: Well, before we go into that, I will state that this matter stands submitted until the 21st. Get your points and authorities, and present them to opposing counsel.

Mr. Bowker: I have a couple of cases here, if the Court cares to read them.

The Referee: You had better present them in one brief, but be sure they are in point, will you?

Mr. Bowker: Yes, Your Honor.

(Which was all the evidence offered and received in the above entitled cause at the time and place aforesaid.) [60]

State of California,
County of Los Angeles.—ss.

I, Byron Oyler, Official Court Reporter for the Honorable Hugh L. Dickson, Referee in Bankruptcy, do hereby certify that on December 17, 1942, at 1:00 a. m. and 2:00 p. m., I reported the Matter of the Sovereign Oil Corporation, Debtor, in re. Hearing on Order to Show Cause on Holders of Landowners' Royalties; that the foregoing sixty pages are a full, true, and accurate transcript of my shorthand notes in said proceeding.

In Witness Whereof, I have hereunto set my hand this twenty-eighth day of January, 1943.

BYRON OYLER
Official Court Reporter.

[Endorsed]: Filed Feb. 3, 1943. Hugh L. Dickson, Referee. C. M. Commins, Clerk, H.N.

[Endorsed]: Filed Feb. 8, 1943 Edward L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [61]

In the District Court of the United States, Southern District of California, Central Division
In Proceedings Under Chapter XI

No. 40,852-B

In the Matter of

SOVEREIGN OIL CORPORATION, a corporation,

Debtor.

PROOF OF CLAIM

At Los Angeles, in the Southern District, Central Division of California, in the County of Los Angeles, State of California, on the 13th day of August, A. D. 1942, came A. A. McCray, Wm. H. Ramsaur and F. R. C. Fenton, and made oath and said:

1. That we all reside in the County of Los Angeles, State of California, and constitute the duly authorized committee chosen by the lessors hereinafter designated as claimants, who executed that certain oil and gas lease designated as "El Segundo

Block 31 Community Oil and Gas Lease" on November 24, 1937, which lease was executed by the Debtor as lessee. That we have been duly authorized by claimants to make this deposition. That each of us has knowledge of the facts upon which this claim is based and of all the facts set forth herein, and each of us is a lessor and claimant.

2. That on or about the 24th day of November, 1937 the claimants herein executed an oil and gas lease conveying Lots 1 to 18 inclusive in Block 31 of the Townsite of El Segundo as per map in Book 18, Page 69 of Maps, Los Angeles County records, to the debtor herein as lessee. That said lessee by the terms of said lease agreed to pay to claimants as royalty a certain percentage of the value of the oil produced from said land. That the Debtor drilled a producing oil well on said premises. That by the terms of said lease the Debtor was required to pay to claimants 16-2/3 per cent of the value of the oil produced by said well during the months of March, April, May and June of the year 1942. That on the 19th day of June, 1942 this Court appointed a receiver who took over the operation of said well. That royalties for the months of March, April, May and that part of June during which the Debtor operated said well, were not paid. That claimants are dependent upon statements issued by the Debtor to ascertain the exact amount of royalties during said period. That such statements have not been issued to claimants by the Debtor. That claimants have data furnished by Shepard-Pendleton & Company, which company is engaged in the business of check-

ing the production of oil wells and that from the data so furnished claimants have calculated that the amount due and owing from the Debtor to claimants for the period above mentioned, from the 1st day of March until the 19th day of June, 1942, is $2,687.58. That claimants ask leave to amend this proof of claim when they have ascertained the exact amount due for delinquent royalties above mentioned.

That Debtor has withheld for a long period of time from royalty payments to these claimants an amount equal to 2c per barrel for the stated purpose of paying mineral taxes levied by the State of California upon the production of oil from the above mentioned lease. That said amount so withheld has been in excess of the amount of said mineral taxes chargeable to claimants under the terms of said lease. That claimants do not know the exact amount of the excess so withheld as they are dependent for that information upon statements issued by the debtor which were not received, but that claimants can approximate said amount so due from taxes heretofore accounted for, and therefore state that the excess amount so withheld was and is approximately $200.00, which is justly due and owing to these claimants.

That the total amount of the aforesaid indebtedness consisting of delinquent royalties and excess amount of money withheld to pay taxes, is $2,887.58.

No part of said debt has been paid.

There are no set-offs or counterclaims to said debt.

No judgment has been rendered for said debt.

Neither the claimants nor any person by the order of the claimants or to knowledge or belief of the claimants, has had or received any manner of security for said debt whatever, other than as above stated.

A. A. McCRAY
WM. H. RAMSAUR
F. R. C. FENTON
Committee for Claimants.

Subscribed, sworn to and acknowledged before me, this 13 day of August, 1942, said subscribers being known to me to be the persons described in and who signed, swore to and acknowledged the above instrument.

[Seal] M. E. MARSH
Notary Public in and for the County of Los Angeles, State of California
My Commission Expires June 15, 1945

[Endorsed]: Filed Aug. 13, 1942. Hugh L. Dickson, Referee. C. M. Commins, Clerk.

[Title of District Court and Cause.]

PROOF OF CLAIM OF A. A. McCRAY, TRUSTEE, FOR HOLDERS OF OVERRIDING ROYALTIES IN EL SEGUNDO COMMUNITY LEASE No. FOUR-A.

At Los Angeles, in the Southern District, Central Division of California, in the County of Los An-

geles, State of California, on the fourth day of December, A. D. 1942, came A. A. McCray, Trustee for M. C. McCray, A. A. McCray, Ruth D. Cornell, and Britt L. Bowker, and made oath and said;

1. That I reside in the County of Los Angeles, State of California. That until the thirty-first day of December, 1940, the Elsie Oil Company was a California corporation duly authorized to transact business in the State of California, and that on said date said corporation was dissolved pursuant to the laws of the State of California and pursuant to said dissolution all of the assets of said corporation were duly assigned to A. A. McCray, Britt L. Bowker, Ruth D. Cornell, and M. C. McCray in undivided one-fourth interests. That among the assets of said corporation which were distributed was the interest in the assignment of that certain oil and gas lease as hereafter set forth. That subsequent to said dissolution claimant was appointed and authorized to act as trustee for the collection and disbursement of all royalties as hereinafter described, by the aforementioned individuals.

2. That on or about the thirty-first day of March, 1937, the said Elsie Oil Company executed an oil and gas lease known as El Segundo Community Lease No. Four-A dated the thirty-first day of March, 1937, as lessee with certain landowners as designated in said lease as lessors. That, thereafter, on or about the twenty-third day of May, 1938, said Elsie Oil Company assigned to Imperial Corporation, a Nevada corporation a portion of said lease reserving to itself certain over-riding royalties to-wit:

(a) On all wells which produce a daily average of less than two hundred (200) barrels of net clean oil during any calendar month, an overriding royalty of two percent (2%) of the value of all oil, gas, both wet and dry, gasolines and all other hydrocarbon substances produced, saved, and sold during said calendar month.

(b) On all wells which produce a daily average in excess of two hundred (200) barrels of net clean oil during any calendar month, an overriding royalty of three and one-third per cent (3-1/3%) of the value of all oil, gas, both wet and dry, gasolines and all other hydrocarbon substances produced, saved, and sold during said calendar month.

In addition to the royalty hereinabove reserved to Elsie and subject to the limitation, terms and conditions hereinafter in this paragraph set forth, Elsie hereby reserves unto itself, its successors and assigns, an overriding royalty of five percent (5%) of the value of the oil, only produced saved and sold on or from the real property covered by the assignment executed concurrently herewith, such overriding royalty to be paid to Elsie, however, only until such time as Elsie shall have received from the proceeds of the overriding royalty herein in this paragraph reserved, the sum of Five Thousand Dollars ($5,000.00) for each well drilled.

Claimant is informed and believes, and upon such information and belief alleges, that said Imperial Corporation assigned its interest under said oil and gas lease to Debtor and pursuant to said assignment Debtor agreed to be bound by the terms and conditions of said lease and of said assignment from Elsie Oil Company to Imperial Corporation including the payment of over-riding royalties as hereinabove set forth.

3. That said Debtor drilled a producing oil well on a portion of the land covered by said lease and covered by said assignments, to-wit:

> Lots 1 to 37 both inclusive and Lots 39 and 40, Tract 3012, recorded in Map Book 29, Page 39, Records of Los Angeles County; and Lots 1 to 33 both inclusive, Tract 2028, recorded in Map Book 35, Page 37, Records of Los Angeles County; and Lot 79, Block 123 as per Sheet No. 8, El Segundo, recorded in Map Book 22, Pages 106-107, Records of Los Angeles County.

That pursuant to the terms of said assignment, from Elsie Oil Company as heretofore set forth, Debtor was required to pay to the said Elsie Oil Company two percent together with an additional five percent of the value of the oil produced by said well during the months of January, February, March, April, May, and June, 1942. That on the nineteenth day of June, this Court appointed a receiver who took over the operation of said well. That royalties for the months of January, February, March, April, May, and that part of June

during which the Debtor operated said well, were not paid. The claimant is dependent upon statements issued by the Debtor to ascertain the exact amount of royalties during said period. That according to data which claimant has in its possession, claimant calculates that the amount due and owing from Debtor to claimant for the period above mentioned, from the first day of January, 1942, until the nineteenth day of June, 1942, is the sum of $422.85.

That the total amount of the aforesaid indebtedness consisting of delinquent royalties is $422.85. That no part of said debt has been paid. There are no off-sets or counter claims to said debt. That no judgment has been rendered for said debt. That the claimant nor any other person by order of the claimant, or to knowledge or belief of the claimant, has had or received any manner of security for said debt whatever, other than above stated.

A. A. McCRAY
Trustee for M. C. McCray, A. A. McCray, Ruth D. Cornell, and Britt L. Bowker.

Subscribed, sworn to and acknowledged before me, this fourth day of December, 1942, said subscriber being known to me to be the person described in and who signed, swore to and acknowledged the above instrument.

[Seal] LORRAINE TOPPING

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires December 15, 1943.

[Endorsed]: Filed Dec 5 1942. Hugh L. Dickson, Referee. O. M. Commins, Clerk, H. N.

[Title of District Court and Cause.]

PROOF OF CLAIM OF A. A. McCRAY, TRUSTEE, FOR HOLDERS OF OVERRIDING ROYALTIES IN EL SEGUNDO COMMUNITY LEASE No. TWO-B

At Los Angeles, in the Southern District, Central Division of California, in the County of Los Angeles, State of California, on the fourth day of December, A. D. 1942, came A. A. McCray, Trustee for M. C. McCray, A. A. McCray, Ruth D. Cornell, and Britt L. Bowker, and made oath and said;

1. That I reside in the County of Los Angeles, State of California. That until the thirty-first day of December, 1940, the Elsie Oil Company was a California corporation duly authorized to transact business in the State of California, and that on said date said corporation was dissolved pursuant to the laws of the State of California and pursuant to

said dissolution all of the assets of said corporation were duly assigned to A. A. McCray, Britt L. Bowker, Ruth D. Cornell, and M. C. McCray in undivided one-fourth interests. That among the assets of said corporation which were distributed was the interest in the assignment of that certain oil and gas lease as hereafter set forth. That subsequent to said collection and disbursement of all royalties as hereinafter described, by the aforementioned individuals.

2. That on or about the third day of April, 1937, the said Elsie Oil Company executed an oil and gas lease known as El Segundo Community Lease No. Two-B dated the third day of April, 1937, as lessee with certain landowners as designated in said lease as lessors. That, thereafter, on or about the fourteenth day of April, 1938 said Elsie Oil Company assigned to Debtor a portion of said lease reserving to itself certain over-riding royalties to-wit:

(a) On all wells which produce a daily average of less than two hundred (200) barrels of net clean oil during any calendar month, an overriding royalty of two per cent (2%) of the value of all oil, gas, both wet and dry, gasolines and all other hydrocarbon substances produced, saved, and sold during said calendar month.

(b) On all wells which produce a daily average in excess of two hundred (200) barrels and less than seventeen hundred fifty (1750) barrels of net clean oil during any calendar month, an overriding royalty of three and one-

third per cent (3-1/3%) of the value of all oil, gas, both wet and dry, gasolines and all other hydrocarbon substances produced, saved, and sold during said calendar month.

(c) On all wells which produce a daily average in excess of seventeen hundred fifty (1750) barrels of net clean oil during any calendar month, an overriding royalty of five and eighty-four hundredths per cent (5.84%) of the value of all oil, gas, both wet and dry, gasolines and all other hydrocarbon substances produced, saved, and sold during said calendar month.

3. That said Debtor drilled a producing oil well on a portion of the land covered by said lease and covered by said assignment, to-wit:

Lots 1 to 18 inclusive, Block 32, as per Sheet No. 1 El Segundo, recorded in Map Book 18, Page 69, Records of Los Angeles County.

That pursuant to the terms of said assignment as heretofore set forth, Debtor was required to pay to Elsie Oil Company, 2% of the value of the oil produced by said well during the months of January, February, March, April, May, and June of the year 1942. That on the nineteenth day of June, this Court appointed a receiver who took over the operation of said well. That royalties for the months of January, February, March, April, May, and that part of June during which the Debtor operated said well, were not paid. The claimant is dependent upon statements issued by the Debtor to ascertain the exact amount of royalties during said period.

That according to data which claimant has in its possession, claimant calculates that the amount due and owing from Debtor to claimant for the period above mentioned, from the first day of January, 1942 until the nineteenth day of June, 1942, is the sum of $149.88.

4. That the total amount of the aforesaid indebtedness consisting of delinquent royalties is $149.88. That no part of said debt has been paid. There are no off-sets or counter claims to said debt. That no judgment has been rendered for said debt. That the claimant nor any other person by order of the claimant, or to knowledge or belief of the claimant, has had or received any manner of security for said debt whatever, other than above stated.

A. A. McCRAY
Trustee for M. C. McCray, A. A. McCray, Ruth D. Cornell, and Britt L. Bowker.

Subscribed, sworn to and acknowledged before me, this fourth day of December, 1942, said subscriber being known to me to be the person described in and who signed, swore to and acknowledged the above instrument.

[Seal] LORRAINE TOPPING
Notary Public in and for the County of Los Angeles, State of California.
My Commission Expires December 15, 1943.

[Endorsed]: Filed Dec 5 1942. Hugh L. Dickson, Referee. O. M. Commins, Clerk. H. N.

[Title of District Court and Cause.]

PROOF OF CLAIM OF EDLOU COMPANY, ET AL, LANDOWNERS IN EL SEGUNDO COMMUNITY LEASE No. FOUR-A.

At Los Angeles, in the Southern District, Central Division of California, in the County of Los Angeles, State of California, on the fourth day of December, A. D. 1942, came Edlou Company, a California corporation, by A. A. McCray, Secretary, who on behalf of said corporation made oath and said;

1. That I am the secretary of Edlou Company, a corporation incorporated by and under the laws of the State of California and carrying on business at 8306 Wilshire Blvd., Beverly Hills, County of Los Angeles, State of California, and that I am duly authorized to make this proof of debt.

2. That said corporation is one of the community lessors of that certain oil and gas lease known as El Segundo Community Lease No. Four-A dated the thirty-first day of March, 1937, by and between Elsie Oil Company, as lessee, and C. E. Hoyt, et al, as lessors, and recorded in Book 15280, Page 285, Official Records of Los Angeles County. That thereafter, on or about the twenty-third day of May, 1938, said Elsie Oil Company assigned to Imperial Corporation, a Nevada corporation, a portion of the land covered by said lease. That pursuant to the terms of said lease and said assignment, said Debtor agreed to be bound by all of the terms and conditions of the original lease and to pay all royalties

called for thereunder. Claimant is informed and believes, and upon such information and belief alleges that said Imperial Corporation assigned its interest under said oil and gas lease to Debtor and pursuant to said assignment Debtor agreed to be bound by the term and conditions of said lease including the payment of royalties due landowners as provided for therein.

3. That said Debtor drilled a producing oil well on the land covered by said lease and said assignment, to-wit:

> Lots 1 to 40 inclusive, Tract No. 3012 El Segundo, recorded in Map Book 29, Page 39; and Lots 1 to 33 inclusive, Tract No. 2028, El Segundo, recorded in Map Book 35, Page 37 and Lot 9, Block 123, ac per Sheet No. 8, El Segundo recorded in Map Book 22, Pages 106-107, Records of Los Angeles County.

That pursuant to the terms of the original lease on said premises and assignment from Elsie Oil Co. thereto as heretofore set forth, Debtor was required to pay to Edlou Company and all other landowners of said El Segundo Community Lease No. Four-A, 16-2/3% of the value of the oil produced by said well during the months of January, February, March, April, May, and June of the year 1942. That on the nineteenth day of June, 1942 this Court appointed a receiver who took over the operation of said well. That royalties for the months of January, February, March, April, May, and that part of June during which the Debtor operated said well, were not paid. The claimant is dependent upon

statements issued by the Debtor to acertain the exact amount of royalties during said period. That according to data which claimant has in its possession, claimant calculates that the amount due and owing from Debtor to claimant and said remaining landowners for the period above mentioned, from the first day of January, 1942 until the nineteenth day of June, 1942 is the sum of $986.45.

4. That Debtor has withheld for a long period of time from royalty payments to claimant and other landowners under said lease and to said Elsie Oil Company under said assignment from Elsie Oil Company an amount equal to two cents per barrel for the stated purpose of paying mineral rights taxes levied by the County of Los Angeles upon the production of oil from the above mentioned property. That said amount so withheld has been in excess of the amount of said mineral rights taxes chargeable to landowners under said lease and to said Elsie Oil Company under said assignment. That claimant is dependant upon statements issued by Debtor to determine the exact amount of excess so withheld as well as to the prorata share of said amount chargeable to landowners and Elsie Oil Company. That according to information furnished claimant by Debtor the total amount of excess so withheld is $86.49.

5. That the total amount of the aforesaid indebtedness consisting of delinquent royalties and refund due for taxes is $1,072.94. That no part of said debt has been paid. There are no off-sets or counter claims to said debt. That no judgment has

been rendered for said debt. That the claimant nor any other person by order of the claimant, or to knowledge or belief of the claimant, has had or received any manner of security for said debt whatever, other than above stated.

6. That there are in excess of sixty lessors named in said community oil and gas lease and that a number of said lessors reside in different parts of the country and that several of ths lessors have requested claimant to look after their interests and that it is impractical and unreasonable for all of the lessors to file claims and that claimant, as a landowner and lessor in said aforementioned lease, makes this proof of claim on behalf of itself and all other landowners and lessors under said lease.

EDLOU COMPANY
By A. A. McCRAY
Secretary

Subscribed, sworn to and acknowledged before me, this fourth day of December, 1942, said subscriber being known to me to be the secretary of the Edlou Company and the person described in and who signed, swore to and acknowledged the above instrument.

[Seal] LORRAINE TOPPING
Notary Public in and for the County of Los Angeles, State of California.
My Commission Expires December 15, 1943.

[Endorsed]: Filed Dec 5 1942. Hugh L. Dickson, Referee. O. M. Commins, Clerk. H.N.

[Title of District Court and Cause.]

PROOF OF CLAIM OF EDLOU COMPANY, ET AL, LANDOWNERS IN EL SEGUNDO COMMUNITY LEASE No. TWO-B.

At Los Angeles, in the Southern District, Central Division of California, in the County of Los Angeles, State of California, on the fourth day of December, A. D. 1942, came Edlou Company, a California corporation, by A. A. McCray, Secretary, who on behalf of said corporation made oath and said;

1. That I am the secretary of Edlou Company, a corporation incorporated by and under the laws of the State of California and carrying on business at 8306 Wilshire Blvd., Beverly Hills, County of Los Angeles, State of California, and that I am duly authorized to make this proof of debt.

2. That said corporation is one of the community lessors of that certain oil and gas lease known as El Segundo Community Lease No. Two-B, dated the third day of April, 1937, by and between Elsie Oil Company, as lessee, and El Segundo Land and Improvement Company et al as lessors, and recorded in Book 15448, Page 261 of Official Records of Los Angeles County. That thereafter on or about the fourteenth day of April, 1938, said Elsie Oil Company assigned to Debtor a portion of the land covered by said lease. That pursuant to the terms of said lease and said assignment, said Debtor agreed to be bound by all of the terms and conditions of the original lease and to pay all royalties called for thereunder.

3. That said Debtor drilled a producing oil well on the land covered by said lease and said assignment, to-wit:

> Lots 1 to 15 inclusive, Block 32 as per Sheet No. 1, El Segundo, recorded in Map Book 18, Page 69, Records of Los Angeles County.

That pursuant to the terms of the original lease on said premises and assignment thereto as heretofore set forth, Debtor was required to pay to Edlou Company and all other landowners of said El Segundo Community Lease No. Two-B, 16-2/3% of the value of the oil produced by said well during the months of January, February, March, April, May, and June of the year 1942. That on the nineteenth day of June, 1942 this Court appointed a receiver who took over the operation of said well. That royalties for the months of January, February, March, April, May, and that part of June during which the Debtor operated said well, were not paid. The claimant is dependent upon statements issued by the Debtor to ascertain the exact amount of royalties during said period. That according to data which claimant has in its possession, claimant calculates that the amount due and owing from Debtor to claimant and said remaining landowners for the period above mentioned, from the first day of January, 1942 until the nineteenth day of June, 1942 is the sum of $1,248.32.

4. That Debtor has withheld for a long period of time from royalty payments to claimant and

other landowners under said lease and to said Elsie Oil Company under said assignment an amount equal to two cents per barrel for the stated purpose of paying mineral rights taxes levied by the County of Los Angeles upon the production of oil from the above mentioned property. That said amount so withheld has been in excess of the amount of said mineral rights taxes chargeable to landowners under said lease and to said Elsie Oil Company under said assignment. That claimant is dependent upon statements issued by Debtor to determine the exact amount of excess so withheld as well as to the prorata share of said amount chargeable to landowners and Elsie Oil Company. That according to information furnished claimant by Debtor the total amount of excess so withheld is $98.23.

5. That the total amount of the aforesaid indebtedness consisting of delinquent royalties and refund due for taxes if 1,346.55. That no part of said debt has been paid. There are no off-sets or counter claims to said debt. That no judgment has been rendered for said debt. That the claimant nor any other person by order of the claimant, or to knowledge or belief of the claimant, has had or received any manner of security for said debt whatever, other than above stated.

6. That there are in excess of fifty lessors named in said community oil and gas lease and that a number of said lessors reside in different parts of the country and that several of the lessors have requested claimant to look after their interests and that it is impractical and unreasonable for all of

the lessors to file claims and that claimant, as a landowner and lessor in said aforementioned lease, makes this proof of claim on behalf of itself and all other landowners and lessors under said lease.

EDLOU COMPANY
By A. A. McCRAY
Secretary

Subscribed, sworn to and acknowledged before me, this fourth day of December, 1942, said subscriber being known to me to be the Secretary of the Edlou Company and the person described in and who signed, swore to and acknowledged the above instrument.

[Seal] LORRAINE TOPPING
Notary Public in and for the County of Los Angeles, State of California.
My Commission Expires December 15, 1943.

[Endorsed]: Filed Dec 5 1942. Hugh L. Dickson, Referee. O. M. Cummins, Clerk. H. N.

[Endorsed]: No. 10594. United States Circuit Court of Appeals for the Ninth Circuit. Western Mesa Oil Corporation and El Segundo Oil Company, Appellants, vs. Edlou Company, et al., Landowners in El Segundo Community Lease No. Four-A; Edlou Company, et al., Landowners in El Segundo Community Lease No. Two-B; A. A. McCray, Trustee, for holders of Overriding Royalties in El Segundo Community Lease No. Four-A; A. A. McCray, Trustee for holders of overriding Royalties in El Segundo Community Lease No. Two-B; A. A. McCray, Wm. H. Ramsaur and F. R. C. Fenton, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 26, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10594

WESTERN MESA OIL CORPORATION and EL SEGUNDO OIL COMPANY,

Appellants,

vs.

EDLOU CORPORATION, et al,

Appellees.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL

1. The order of the District Court is contrary to law.

2. The District Court erred in denying the petition for review of these Appellants and affirming the orders of the Referee in Bankruptcy which determined that landowners are entitled to the status of priority claimants in this case.

3. The District Court erred in holding that the Appellees had not waived their right to declare a forfeiture of the oil leases involved herein, despite the uncontradicted evidence that after defaults had taken place and with knowledge of such defaults, the landowners did nothing to declare a forfeiture, and accepted payment of royalties with full knowledge of the defaults.

4. The District Court erred in holding that there had been no waiver by the Appellees of their right

to declare a forfeiture of the leases in view of the uncontradicted evidence that the possession of the debtor corporation as well as the possession of the receiver, who succeeded the debtor corporation in the operation of the oil wells involved, at no time was challenged or threatened with any notice of intention to declare a forfeiture because of the non-payment of certain back royalties.

5. The District Court erred in holding that the Appellees, landowners, were entitled to priority over the other creditors under the plan of arrangement in these proceedings, despite the fact that before a forfeiture could be effected under the leases involved, it was necessary for the landowners to give a ninety day written notice of intention to declare a forfeiture, the record being undisputed that no such written notice was ever given to the debtor or to the receiver, who succeeded it, of any intention on the part of the landowners to declare the oil leases, or any of them, forfeited.

6. The District Court erred in holding that the Appellees had not waived their right to forfeiture and priority status in view of the fact that all of the Appellees herein, with full knowledge of the facts in the case, had filed claims herein as unsecured creditors.

7. The District Court erred in failing to hold that by virtue of their conduct in accepting payment of royalties from the debtor and then from the receiver, both prior to and after the commencement of the bankruptcy proceedings, and with full knowledge of the default of the debtor with respect

to certain royalty payments, the Appellees were estopped from thereafter asserting rights to priority and forfeiture.

8. The District Court erred in holding that the landowners had not waived their right to declare a forfeiture on the ground that the landowners had refused to acquiesce in the revised plan of arrangement if by doing so there would be a waiver of the right of forfeiture. There is no evidence of any kind in the record to support such finding by the District Court. The evidence will clearly show that the landowners received payments of royalties after their alleged right to forfeiture had accrued and had accepted such royalties without exercising the right to declare a forfeiture. There is no evidence in the record whatsoever which supports a finding by the District Court that there were any conditions attached to the acceptance of the royalty payments by the landowners.

9. The District Court erred in failing to recognize that the El Segundo Oil Company, as successor to the debtor, and the receiver, and the Western Mesa Oil Corporation, had the right to object to any claims on any grounds available to any of them under the law.

10. The District Court erred in holding and determining that the objections to the claims of landowners and overriding royalty holders were limited to the acts and conduct of the landowners and overriding royalty holders before the commencement of the bankruptcy proceedings and further erred in disregarding and rejecting the evidence of acts and

conduct of such claimants subsequent to the commencement of such proceedings which fully disclosed that after receiving full knowledge of the default which would give rise to the right to declare a forfeiture, said claimants, not only accepted payment of royalty, but also filed claims indicating no assertion of rights greater than that of unsecured creditors.

11. The District Court erred in affording the Appellees the status of priority despite the fact that the uncontradicted evidence reveals that the claimants at no time advised the debtor or the receiver of their intention to declare a forfeiture occasioned by default. That the debtor and the receiver were thus led to believe that any right to declare a forfeiture was being waived by the Appellees, and that the plan of arrangement was entered into by the debtor, the receiver, the Appellants herein and the creditors of this estate in reliance upon such waiver by the Appellees of the right to declare the oil leases herein involved as having been forfeited because of default in the payment of certain royalties.

12. The District Court erred in failing to distinguish between the evidence that was offered with respect to the Appellees, whose rights arose under Well No. 1, and the Appellees whose rights arose under Wells Nos. 2 and 4.

13. The District Court's order is erroneous because it failed to give effect to the fact that the El Segundo Oil Company as the successor to the debtor and the receiver, and the Western Mesa Oil Corporation, has all the right of its predecessors afore-

named to object to the claims of any creditors on any grounds as provided by law and as recognized by the plan of arrangement herein.

Dated this 8th day of November, 1943.

RAPHAEL DECHTER

By .....

Attorney for Appellants

[Endorsed]: Filed Nov. 10, 1943. Paul P. O'Brien, Clerk.

No. 10594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

6

WESTERN MESA OIL CORPORATION, etc.,

Appellants,

vs.

EDLOU COMPANY, *et al.*,

Appellees.

APPELLEES' REPLY AS TO NO. 2 AND NO. 4 WELLS.

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Parker & Company, Law Printers, Los Angeles

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No. 10594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN MESA OIL CORPORATION, etc.,

Appellants,

vs.

EDLOU COMPANY, *et al.*,

Appellees.

APPELLEES' REPLY AS TO NO. 2 AND NO. 4 WELLS.

Statement of the Case.

The Appellees herein, being the landowners of that certain property on which No. 2 and No. 4 Wells are situated, make this restatement of facts as follows:

At the time the Debtor Corporation herein filed its petition and submitted its plan of arrangement under Chapter XI of the Bankruptcy Law, it listed total assets of $147,650.00 [R. 10]. Real estate comprised $145,000.00 of this amount, which real estate consisted of the Debtor Corporation's interest in four oil and gas leases [R. 10]. The Debtor Corporation's interest in the No. 2 and No. 4 Wells was valued at $30,000.00 each [R. 20 and 22]. The

leases under which said Debtor Corporation was operating said two wells were community oil and gas leases wherein many landowners participated in the royalties.

The leases as executed by the landowners of said wells contained the usual clauses providing for cancellation of said leases after notice of default for non-payment of royalties [R. 164 and 165]. No notice of forfeiture or of intention to declare a forfeiture had been given by said landowners prior to the filing of Debtor Corporation's petition herein [R. 160 and 165].

On or about March 20, 1942 royalty payments were made by the Debtor Corporation to Bank of America, as depositary for said landowners for royalties due in the month of December, 1941 [R. 215, 216, 217, and 218]. No payments were made subsequent to this time by said Debtor Corporation to said landowners for royalties until the receiver of the Debtor Corporation was duly appointed and had qualified. The receiver paid the current royalties as they fell due from June 19, 1942 until the reorganization was completed [R. 165, 218, 219 and 220].

On June 19, 1942 Debtor Corporation filed its petition in proceedings under Chapter XI of the Bankruptcy Act [R. 2]. The arrangement as contained in Exhibit "A" of said petition stated that the landowners' royalties should be paid prior to the payment of any other debts or obligations from the gross profits derived from the production of the wells [R. 7 and 8].

A Revised Plan of Arrangement was thereafter filed by the Debtor Corporation on December 3, 1942 [R. 77]. Said plan provided that landowners' royalties would be paid in full in the same manner as priority claims, where the facts disclosed that the landowners had not, prior to the filing of Debtor Corporation's petition in bankruptcy, waived their right of forfeiture of the oil and gas leases, either in writing or by their conduct [R. 81].

On December 5, 1942 proofs of claims were filed by said landowners setting forth briefly the facts pertaining to the oil and gas leases and the amount of royalties due them thereunder [R. 223, 231, 235 and 239].

On December 9, 1942 Debtor Corporation filed its petition for the determination of the rights and status of holders of landowners' royalties [R. 51]. Said petition set forth the plan for payment of landowners' royalties as the same had been set forth in the revised plan of arrangement [R. 52 and 53]. Pursuant to such petition, Hon. H. L. Dickson, Referee in Bankruptcy, issued an Order to Show Cause on December 10, 1942 requiring the holders of the landowners' royalties to show cause why the said petition should not be granted [R. 67].

A hearing was held before the Referee [R. 157]. The Referee made an order determining that royalties due the landowners of No. 2 and No. 4 Wells should be paid in full [R. 68].

ARGUMENT.

These appellees adopt the opinion of Judge Beaumont of the United States District Court as their argument in reply to the points advanced by appellants [R. 131]. The question as well as the authorities on which said decision was based were concisely stated therein. The points relied upon by appellants will, however be answered in the order the same appear.

REPLY TO APPELLANTS' POINT NO. I.

The revised plan of arrangement, as submitted by the Debtor Corporation, was approved by the appellants herein prior to the time that said plan was filed in the bankruptcy proceedings. The petition for determination of rights and status of holders of landowners' royalties was filed by the Debtor Corporation and the appellants herein. The plan provided that under certain conditions landowners' royalties would be paid *in the same manner as priority claims* [R. 81] (emphasis supplied). The plan therefore simply provided for the manner in which said claims would be paid. The plan did not attempt to fix the status of the claims according to regular bankruptcy proceedings as being a secured, unsecured or prior claim. The only interpretation that could be given this clause would be that the claims would be paid in full providing the landowners had not waived their right to declare a forfeiture prior to the filing of the petition in bankruptcy. The revised plan of arrangement was accepted by the landowners in this light. It is difficult to understand how the appellants after approving said revised plan of arrangement can now maintain that the Court has no right to make a decree, ordering that the oil royalties should

be paid in full, *i. e.*, in the same manner as priority claims. In the brief submitted by other appellees herein, to-wit, landowners of community Well No. 1, the matter of prior claims under Chapter XI of the Bankruptcy Act is adequately and clearly set forth, and rather than reiterate the law as therein set forth, we refer the Court to the reply to appellants' Point No. 1 in said brief.

The appellants contend that the landowners waived their rights to declare a forfeiture for non-payment of royalties by not giving the Debtor Corporation written notice that it was in default. Many cases are cited holding that such notice is a prerequisite to a successful maintenance of a suit to recover possession or quiet title against a lessee.

These cases do not seem to be in point in so far as they deal with the matter before this court. The notice of default and demand for payment within a certain time is a necessary first step before a complete forfeiture can be declared, but until the right to give this notice is shown to have been waived in writing or by conduct prior to the bankruptcy, the objection and the law cited by appellants do not seem applicable.

There is nothing in the record to show that the landowners of No. 2 and No. 4 Wells by their conduct waived this right.

Waiver is a voluntary abandonment of a known existing right.

> *Connor v. Union Automobile Insurance Co.*, 122 Cal. App. 105.

The landowners of No. 2 and No. 4 Wells had the right each day from March 20, 1942, the date upon which

royalties were paid for December, 1941, to June 19, 1942, the date Debtor Corporation filed its petition under Chapter XI, to give notice of default to Debtor Corporation for non-payment of royalties. The mere failure to give such notice is not, standing alone, a voluntary abandonment of this right.

REPLY TO APPELLANTS' POINTS NO. II AND NO. III.

Appellants contend that the acceptance of royalty payments by the landowners from the receiver of the Debtor Corporation subsequent to June 19, 1942 operated as a waiver of the landowners' right to declare a forfeiture. This contention is directly in conflict with the revised plan of arrangement which provided that any waiver would be based on the conduct of the landowners prior to the filing of the petition by Debtor Corporation under Chapter XI of the Bankruptcy Act. Any actions therefore such as receipt of royalties occurring subsequent to said filing were immaterial to the issue involved herein.

Findings by the Referee herein show that the last check received on behalf of the landowners of No. 2 and No. 4 Wells was dated March 20, 1942, and was for royalties due in December, 1941. The evidence and findings further show that the said landowners did not receive any further payment of royalties until after the Debtor Corporation filed its petition under Chapter XI.

The law in California is to the effect that a covenant for the payment of rent is a continuing covenant.

German-American Savings Bank v. Gollmer, 155 Cal. 683.

The failure of Debtor Corporation to pay the landowners royalties for the months of April, May and the first part of June, 1942, gave to the landowners the right to declare a forfeiture at any time during said period. The failure of the landowners to declare such a forfeiture was not a waiver of their right so to do. The cases are uniform to the effect that receipt of rent after a breach of a continuing covenant does not waive the landowners' right to declare a forfeiture for the breach of a subsequent covenant. The acceptance of royalties on March 20, 1942, therefore did not preclude the landowners from declaring a forfeiture for the breach of the continuing covenant to pay royalties from said date to the time the Debtor Corporation filed its petition under Chapter XI.

Appellants cite *Title Insurance & Trust Co. v. Hisey*, 95 F. (2d) 555. This case refers to *Kern Sunset Oil Co. v. Good Roads Oil Co.*, 214 Cal. 435. The law as cited therein is correct as it pertains to the breach of a covenant to perform a single act, but is not the correct law as to a continuing covenant such as payment of rent. The Supreme Court of the State of California in the case of *Kern Sunset Oil Co. v. Good Roads Oil Co.*, 214 Cal. 435, on pages 442 and 443 of said opinion, said:

> "We confess our inability to draw any distinction in principle between an agreement to construct a building upon leased premises and an agreement to drill a well thereon. Each is a covenant to perform a single act, which act when completed results in the performance of the covenant. On the other hand, the failure to perform said act is a breach of the covenant requiring its performance, and once this breach is waived, the subsequent failure of the tenant to comply with said covenant affords the landlord no right to a

forfeiture of the lease. *It would be otherwise with a continuing covenant like that involved in the case of Myers v. Herskowitz,* 33 Cal. App. 581 (165 Pac. 1031), *relied upon by the plaintiff.* The covenant in the lease considered in the opinion in that case provided that a certain passageway 'shall at all times be kept free and clear' for the 'common purpose of ingress and egress of any and all persons doing business in said room and their patrons.' It will readily be seen that this covenant was not to perform a single act, such as constructing a building or drilling a well, but was to preserve a condition in the leased premises which should continue during the entire life of the lease. On each occasion the tenant failed to maintain said condition, he breached the covenant of the lease. Each breach was separate and distinct from the other, and the waiver of one particular breach would not be a waiver of any breach subsequently occurring." (Emphasis supplied.)

As we have heretofore stated the evidence relative to payments of royalties to the landowners by the Receiver after the Debtor Corporation filed its petition under Chapter XI are not within the issue herein. But even if this evidence is considered, the authorities are to the effect that receipt of rent for current months will not serve as a waiver of the land owners' right to forfeiture for failure of lessees to pay royalties due for prior months.

Vol. 2 *Summers Oil and Gas Law,* Section 448, at page 486;

Duffield v. Michaels, Vol. 97, Fed. page 825;

109 *A. L. R.* 1267, at page 1269.

REPLY TO APPELLANTS' POINT NO. IV.

The Proceeding, Being Under the Provisions of Chapter XI, Dealt Only With Unsecured Claims. The Landowners' Claim Was Classed by the Debtor in the Plan or Arrangement as Entitled to Payment in Full.

The Debtor Corporation had a right under Sections 356 and 357 of the Act to propose that the landowners' claims should be paid in full. The revised plan or arrangement including the clauses relating to pay of landowners' royalties in the same manner as prior claims was filed with the Referee on December 3, 1942. The landowners, on December 5, 1942, filed their claims wherein was set forth facts pertaining to the oil and gas leases and the royalties due thereunder. The claim was filed on the theory that the revised plan of arrangement had set forth in full the manner in which said royalties would be paid, and the landowners needed some vehicle for the court record to show the amount of monies owing to them. This was not a claim filed in regular bankruptcy proceedings but merely a statement of claim filed with the court pursuant to the revised plan of arrangement. This being the case the landowners did not waive their right to be paid in the same manner as prior claimants.

REPLY TO APPELLANTS' POINT NO. VI.

Appellants' contention that the District Court erred in determining the rights of the landowners only from their acts and conduct prior to the commencement of the bankruptcy proceedings is not well founded. Appellants state that pleadings in bankruptcy are informal and that the niceties are not to be expected in bankruptcy pleadings. The revised plan of arrangement is in the nature of a

contract wherein property rights are to be settled. The landowners had the right to accept or reject said plan. In the acceptance of the plan by the landowners they relied upon the manner for payment of the royalties as set forth therein, *i. e.*, conduct or landowners prior to the filing of debtor's petition under Section XI. If under the plan the conduct of the landowners both before and after the filing of debtor's petition was to be considered a statement to that effect should have been included in the plan.

Appellants contend that the clause in the revised plan of arrangement providing for the determination by the Court of any controversy that might arise as to the proper status of claims of holders of landowners' royalties means that the Court could consider the conduct of said landowners subsequent to the filing of Debtor Corporation's petition in bankruptcy. This contention in our opinion is erroneous. The proper interpretation of said clause is that the Court should determine any controversy as to the status of said royalty claims by reason of the conduct of said landowners prior to the filing of said bankruptcy petition. In other words, if the landowners and Debtor Corporation could not determine this matter amicably then the Court would make said determination.

The plan was approved by the Referee on December 17, 1942 [R. 100]. Immediately after the plan was approved the controversy herein was tried before the Referee. The language as used in the plan was clear. The findings of the Referee and the opinion of the United States District Court interpreting said language was correct in all respects.

Conclusion.

The landowners of No. 2 and No. 4 Wells did not waive their right of forfeiture of the leases prior to the filing of the petition in bankruptcy by Debtor Corporation for the reason that they did not receive any royalty payments from March 20, 1942, until subsequent to the filing of said petition. During said period said landowners had the right at any time to declare a forfeiture of the lease for non-payment of royalties by giving notice pursuant to the terms of said leases. We therefore submit that the order of the United States District Court should be affirmed.

Respectfully submitted,

MARTIN & BOWKER,

Attorneys for Appellees (No. 2 and No. 4 Wells).

No. 10594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN MESA OIL CORPORATION, and EL SEGUNDO OIL COMPANY,

Appellants,

vs.

EDLOU COMPANY, *et al.*, Landowners in El Segundo Community Lease No. Four-A, EDLOU COMPANY, *et al.*, Landowners in El Segundo Community Lease No. Two-B; A. A. MCCRAY, Trustee, for holders of overriding royalties in El Segundo Community Lease No. Four-A, A. A. MCCRAY, Trustee for holders of overriding royalties in El Segundo Community Lease No. Two-B; A. A. MCCRAY, WM. H. RAMSAUR and F. R. C. FENTON,

Appellees.

APPELLANTS' REPLY TO BRIEF OF APPELLEES OF WELLS NO. 2 AND NO. 4.

RAPHAEL DECHTER and
HARRY A. PINES,
633 Subway Terminal Building, Los Angeles,
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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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vs.

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Appellees.

APPELLANTS' REPLY TO BRIEF OF APPELLEES OF WELLS NO. 2 AND NO. 4.

I.

Statement of the Case.

We take issue with the attempted restatement of the facts of the case that is contained in the brief of the appellees of Wells No. 2 and No. 4. These appellees recite that under the original plan of arrangement, which is attached as Exhibit A to the petition of the debtor for

relief under chapter XI, it was provided that the landowners' royalties should be paid prior to the payment of any other debts (Appellees' No. 2 and No. 4 Brief, p. 2). This plan of arrangement was later superseded by a revised plan of arrangement, and it was the revised plan of arrangement which was confirmed in these proceedings [R. 94]. The original plan provided that out of the gross proceeds derived from the production of the oil wells involved in the case, payment would be made as follows: (1) landowners' royalties (obviously current royalties), (2) necessary operating expenses of the corporation, (3) costs of administration, (4) claims having priority under Section 64 of the Bankruptcy Act, (5) claims of the holders of conditional sales contracts, (6) claims of unsecured creditors, and (7) claims of participating royalty interest holders [R. 7-9]. The first three categories contemplated current, administrative and operating expenses. Categories 4 to 7 inclusive referred to "claims" which were obligations accruing prior to the commencement of the bankruptcy proceedings. It is significant to note that the use of the word "claim" is not included in the first three categories. The order of payment was actually nothing else but a restatement of the order of payment prescribed in ordinary bankruptcy proceedings. The first three categories are placed ahead of the claims of creditors whose rights accrued prior to bankruptcy consistent with the provisions of Section 357(6) of the Bankruptcy Act of 1938, which provides that a plan of arrangement may include "provisions for payment of debts incurred after the filing of the petition and during the pendency of the arrangement in priority over the debts affected by such arrangement."

Appellees of Wells 2 and 4 state that the revised plan provided that "landowners' royalties would be paid in full in the same manner as priority claims where the facts disclosed that the landowners had not, prior to the filing of Debtor Corporation's petition in bankruptcy, waived their right of forfeiture of the oil and gas leases, either in writing or by their conduct" (App. No. 2 and 4 Br. p. 3). This statement would be accurate only if it included the further qualification that only landowners' royalties "which carry with them the right of forfeiture" are so preferred. The best evidence of what the revised plan provided is the provision contained in the plan itself, as follows:

> "Landowners' royalties which carry with them the right of forfeiture of the oil and gas leases under which such royalties are payable and where such right of forfeiture has not, prior to the filing of the petition in bankruptcy, been waived either in writing or by the conduct of the parties, will be paid in full in the same manner as priority claims. Where, however, the facts disclose that prior to the filing of the proceedings hereunder by the debtor, the landowners, by writing or by their conduct, have legally waived the right of forfeiture as to any of the unpaid royalties, the same will be treated the same as those in the class of unsecured creditors. Should any controversy arise as to the proper status of such claims of holders of landowners' royalties, the same shall be determined by the above entitled Court in the above entitled proceeding upon hearing after notice" [R. 81].

II.

Appellees Have Failed to Establish Themselves as the Holders of Landowners' Royalties With Right of Forfeiture.

Appellees of Wells 2 and 4 attempt to avoid the effect of their having failed at any time to have given notice of forfeiture, as required by the leases in question. In their reply to our Point I, appellees concede that the revised plan "provided that *under certain conditions* landowners' royalties would be paid in the same manner as priority claims" (App. 2 and 4 Br. p. 4). Thus far, we are in agreement. The difference between the contentions of the appellants and appellees lies in the question of what constituted those "certain conditions" which would entitle landowners' royalties to be paid in the same manner as priority claims. Appellees state that the only interpretation that could be given the clause would be that the claims would be paid in full providing the landowners had not by conduct or in writing waived their right to declare a forfeiture prior to the filing of the petition in bankruptcy. The interpretation of the provision contained in the revised plan is not difficult. The language is plain and unambiguous. The first sentence of the clause in question states the conditions which would entitle the holder of a landowner's royalty to allowance as a priority claimant. It reads as follows:

> "Landowners' royalties which carry with them the right of forfeiture of the oil and gas leases under which such royalties are payable and where such right of forfeiture has not, prior to the filing of the petition in bankruptcy, been waived either in writing or by the conduct of the parties, will be paid in full in the same manner as priority claims."

It is evident that not all landowners' royalties were entitled to payment in full in the same manner as priority claims. In order to qualify, the landowner's royalty must (1) carry the right of forfeiture; (2) there must be an absence of waiver of the right of forfeiture. The second category necessarily requires the existence of the first, or it would be meaningless. The question of the waiver of a right presupposes the existence of the right that is subject to waiver.

In order to qualify themselves as entitled to priority in this case, it was incumbent upon the appellees to prove that they met the two conditions aforementioned.

The record in this case will disclose that appellees failed utterly to meet the very first condition, to wit: that their rights included the right of forfeiture. In addition to that, the record discloses that had there been a right of forfeiture perfected by the giving of notices as required by the lease, the acceptance of royalty payments from the receiver and the conduct of the landowners in this case constituted a waiver of such right. Appellees of Wells 2 and 4 misstate our contention when they say, on page 5 of their brief, that we "contend that the landowners waived their rights to declare a forfeiture for non-payment of royalties by not giving the Debtor Corporation written notice that it was in default." It is not that the landowners *waived* their rights to declare a forfeiture so much as that they failed to *acquire* the right of forfeiture by not giving such notice as required by the lease to create the right to forfeiture. Appellees slough off rather than answer the effect of the cases cited by us in our opening brief which clearly set forth the rule that the right of forfeiture does not arise until (1) the notice required by the lease in question has been given, and (2)

the lessor has declared a default based upon the failure of the lessee to rectify the default within the time required by the notice. The cases cited hold that the existence of the forfeiture provision in the lease together with the existence of a default do not, in themselves, give rise to the right of forfeiture. The forfeiture provision creates an option on the part of the lessor which he may or may not exercise. He may, as the landowners did in this case, accept current rental payments and avoid giving notice of default as required by the lease. Until such notice is given, he does not have the right of forfeiture. Appellees state that the cases which we cited involved suits to recover possession or quiet title. The right of forfeiture was essential to the maintenance of such actions. In order to determine whether or not the relief could be granted in such cases, the court had to determine the existence of the right of forfeiture. Similarly in this case the court was called upon to determine the existence of the right of forfeiture. These cases all hold that the right of forfeiture does not accrue in the absence of the requisite notices under the lease being given.

35 *C. J.* #248, p. 1075:

> "Inasmuch as it is optional with the lessor whether to avail himself of the breach of a covenant giving him a right to forfeit the lease, it follows that, if he desires to forfeit, *he must manifest his intent by some clear and unequivocal act during the term,* such as by a reentry, the bringing of a suit to recover possession, *or by giving a notice of a character designated in the lease* * * *. Where the landlord claims a forfeiture, he must show that he has done everything necessary to be done on his part to perfect such right." (Emphasis supplied.)

As the Supreme Court of the State of California, in the case of *Jameson v. Chanslor-Canfield M. Oil Co.*, 176 Cal. 1, 6, said:

> "* * * The event which causes the forfeiture is the failure of the lessee to perform any of the conditions embodied in the lease for a period of thirty days after a notification. By the language of the paragraph this notification must be given 'by the parties of the first part.' *It is only upon the giving of this notice and the failure to perform the conditions mentioned therein that the forfeiture can be declared. This is the condition which must happen in order to give a right to declare a forfeiture.*" (Emphasis supplied.)

The purpose of the notice is to enable the lessee to cure the default within the prescribed time.

> *Guffey v. Smith*, 237 U. S. 101, 35 S. Ct. 526, 59 L. Ed. 856, 865,

in which the court said:

> "Under it the lessor could have demanded the rent in arrears, and have notified the complainants in writing that, unless payment was made within a time named in the notice, not less than 5 days thereafter, the lease would be terminated; and upon a failure to pay within that time he could have treated the lease as ended. But there was no such demand or notice, and consequently no failure to comply with either."

Not only was it necessary to establish the giving of the notice itself, but it was necessary for the appellees to establish that the notice was a proper one and joined in by all of the tenants in common involved. These were community leases, and had the notice, if given, omitted as much as one of the lessors, the notice would have

been insufficient to have predicated a rise of the right of forfeiture. Thus, in the case of *Axis Petroleum Co. v. Taylor*, 42 Cal. App. (2d) 389, at page 396, the Court held that the failure of one of the joint tenants to join in the notice of default rendered the notice of default insufficient. See also *Metzler & Co. v. Stevenson*, 217 Cal. 236.

The basis of the notice provisions in an oil and gas lease is to afford the lessee with a period of time after written notice within which he can rectify the default. Therefore forfeiture for a default is impossible until he has been given that notice and has exhausted the time afforded by such notice. In the leases involved in this case, provision was made whereby the lessees were given a period of ninety days after they received written notice from the lessors that unless they rectified the defaults within that ninety-day period forfeiture would be declared. Such notice was never given in this case, and it must follow that the right of forfeiture did not arise. There have been cases in which, under similar leasehold provisions, instead of giving notice that the lease would be forfeited if the default were not remedied within the prescribed time, the lessors gave notice declaring forfeiture. In such cases the courts have held that the notice was as if no notice had ever been given and the right of forfeiture did not arise.

Wellport Oil Co. v. Fairfield, 51 Cal. App. (2d) 533;

Pierce Oil Corp. v. Schacht, 75 Okla. 101, 181 Pac. 731.

According to the reasoning of appellees of Wells 2 and 4, "the notice of default and demand for payment within

a certain time is a necessary first step before a complete forfeiture can be declared, but until the right to give notice is shown to have been waived in writing or by conduct prior to the bankruptcy, the objection and the law cited by appellants do not seem applicable." (App. 2 and 4, Br. 5.) The statement is made with a significant failure to cite supporting authority. Appellees concede that the giving of the notice was a "necessary first step." We could not express it any better. The mere existence of the forfeiture clause would not give rise to the right of forfeiture.

> "The lease did not automatically terminate, because the grantee did not drill on the land described in the lease within one year. Notice in writing by the grantor was necessary to terminate the lease, and on receipt of notice the grantee was privileged to elect to keep the lease alive from year to year by paying an annual rent."
>
> *Brinkman v. Empire Gas and Fuel Co.* (Kan.), 245 Pac. 107.

> "The plaintiff in the court below has not complied with this prerequisite of the contract essential to obtaining a forfeiture, and no forfeiture can be granted."
>
> *Chapman v. Carlock* (Okla.) 230 Pac. 516, 519.

The right to forfeiture is created when the *last* of the acts necessary to create it has occurred. In this case the necessary first step was not taken.

> "Under this rule it must be admitted that forfeiture does not occur until the last of the acts which are to create it has occurred."
>
> *Downing v. Cutting Packing Co.,* 183 Cal. 91, 95.

In the *Downing* case, a notice of forfeiture was given. The court held that the notice did not serve to create the forfeiture, where there was a failure to follow through with the subsequent steps necessary to invoke such result.

> "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."
>
> *Civil Code,* Section 1442.

Appellees of Wells No. 2 and 4 state that each day from March 20, 1942, to June 19, 1942, they had the right to give notice of default for non-payment of royalties (App. 2 and 4, Br. pp. 5, 6). They failed to exercise that right; therefore they did not have the right of forfeiture. Had they exercised their right, they were required to give the debtor corporation a period of 90 days within which to cure the default. Had the debtor then failed to cure the default within such period of 90 days, the landowners would then have had the right to declare a forfeiture of the lease in question.

> "* * * the lease and option agreement contained a clause requiring notification to be given, and * * * forfeiture could not be claimed until thirty days thereafter."
>
> *Templar Mining Co. v. Williams,* 23 Cal. App. (2d) 45, 52.

It is not just *any* notice that could possibly serve the purpose of creating the right of forfeiture. It must be a notice that meets the strict specifications of the lease.

> *Welport Oil Co. v. Fairfield,* 51 Cal. App. (2d) 533.

Where the lease provides that the lessor may declare a lease forfeited upon giving a 90-day notice, then a notice that the lessor has declared the lease forfeited is not in compliance with its terms and does not give rise to a forfeiture.

Pierce Oil Corp. v. Schacht (Okla.), 181 Pac. 731.

III.

The Acceptance of Current Royalties From the Receiver Constituted a Waiver of the Right of Forfeiture.

The very statement of the above mentioned proposition presupposes that the right of forfeiture had been created by the giving of proper notice. The appellants do not admit such right of forfeiture ever arose in this case. For argumentative purposes only, there will be an assumption that such right arose.

Appellees state that the revised plan limited consideration of waiver to acts committed prior to the commencement of the bankruptcy proceedings.

The revised plan does refer only to acts of waiver committed prior to the petition in bankruptcy. This was due to the fact that current royalties were being paid by the receiver, and since the royalties in question arose prior to the filing of the petition, the acts of waiver mentioned were those which took place prior to the petition. But the provision did not limit the debtor, or the new company from asserting any other grounds of objection. Thus in the very paragraph in question the plan provided:

> "Should *any* controversy arise as to the proper status of such claims of holders of landowners' royalties, the same shall be determined by the above

entitled Court in the above entitled proceeding upon hearing after notice." [R. 81.] (Emphasis ours.)

The plan also provided that:

"If * * * there appear to be any objectionable claims filed, the debtor, or any party in interest, including the new corporation, shall have the right to object to the allowance of the same, and such alleged creditors shall participate in the plan as confirmed, only on the basis of the amount of their claims as may finally be allowed by this Court." [R. 84.]

The matter was heard below on the theory that waiver both before and after the filing of the petition in bankruptcy was involved. This placed an interpretation that dispelled any ambiguity that might otherwise have existed. We quote relevant portions of the transcript, to wit:

"Mr. Hunt: I would like to have the record show, Your Honor, during the administration here the Receiver paid the current royalties.

The Referee: I understand that" [R. 165].

It should be noted that the foregoing was without any objections of the appellees.

"Mr. Dechter: It is our contention, Your Honor, that the landowners did not have to accept the rents if they wanted to rely upon their right of forfeiture. We contend they waived the right of forfeiture by their acts and conduct, both before and since the filing of the bankruptcy petition, by accepting royalty checks after they were due and prior to the filing of

bankruptcy petition, and by accepting royalty checks subsequent to the filing of the bankruptcy petition from the Receiver" [R. 189].

The appellees contended that they assumed that only waiver prior to the petition was involved [R. 200, 201].

"Q. Showing you a number of checks, Mr. McCray, made out on all these three wells, starting with August, 1942, down to October, 1942 * * * you received your share of those checks did you not? * * *

Mr. Bowker: Your Honor, I will offer my objection to that question on the grounds it is immaterial and irrelevant to this issue, inasmuch as those checks were received subsequent to the appointment of the receiver, and are not before this Court.

The Referee: It shows the conduct. I will overrule the objection" [R. 218].

Hence it is apparent that the Court resolved the issue of the materiality of conduct subsequent to the filing of the bankruptcy petition in favor of appellants by admitting the evidence over objections of appellees. Thus the findings of fact of the Referee with respect to Wells No. 2 and 4 recited:

"* * * the receiver for said debtor corporation has paid current royalties on said wells to the landowners as the same became due" [R. 70].

IV.

Although Acceptance of Royalties That Are Past Due Does Not Waive Right to Take Advantage of Subsequent Breach, It Is Necessary That Notice Be Given That Strict Adherence to Forfeiture Clause Would Be Made in the Future.

Appellees of Wells 2 and 4 contend that the acceptance of past due royalties on March 20, 1942 did not preclude the landowners from declaring a forfeiture from the breach of the continuing covenant to pay royalties from said date to the time the debtor corporation filed its petition under Chapter XI (App. 2 and 4 Br. 7). The first and obvious answer is that even if they might not have been precluded from doing so, the fact remains that they did not declare a forfeiture for such period. As heretofore pointed out, the only way they could declare the forfeiture was by notice, and it is undisputed that no notice of intent to declare a forfeiture was ever given.

But even such notice could not have been given until the debtor had been notified that further delays in the payment of royalties would not be tolerated.

We start with an assumption favorable to the appellees, to wit: that there was a time of the essence clause in the lease involved, although there is nothing in the record to such effect. Without such a clause, there would be no right to forfeit because of failure to make timely payment of royalties.

When once there has been an acceptance of payment not made punctually, the law is well settled that the right of foreiture is suspended until restored by the giving of a specific notice of intention to enforce it thereafter.

Boone v. Templeman, 158 Cal. 290;
Stevenson v. Joy, 164 Cal. 279;
Hoppin v. Monsey, 185 Cal. 678;
LeBallister v. Morris, 59 Cal. App. 699;
Wetherby v. Sinn, 73 Cal. App. 98;
Pearson v. Brown, 27 Cal. App. 125;
Miller v. Modern Motor Car, 107 Cal. App. 42;
Lafoon v. Collins, 212 Cal. 750.

"When rent is accepted by the lessor, with knowledge on his part that the lessee was every day violating the covenants of the lease, it was held that the lessor accepting rent could not declare a forfeiture without a reasonable prior notice that further noncompliance would not be waived."

Thornton on Oil & Gas, vol. 2, #281, p. 532 (citing many cases).

V.

Receipt of Royalties for Current Months Serves as a Waiver of Right of Forfeiture for Failure to Pay Royalties Due for Prior Months.

Appellees of Wells No. 2 and 4 cite 109 A. L. R. 1267, 2 Summers Oil & Gas Law, p. 486, and *Duffield v. Michaels,* 97 F. 825 to support their contention that the receipt of rent for current months will not serve as a waiver of the landowner's right to forfeiture for failure of lessees to pay royalties due for prior months.

Suffice to say, such is not the law in California.

> "* * * And if thereafter he accepts rent accruing subsequent to the demand for possession or accruing subsequently to the commencement of the action, and accept it as rent *eo nomine,* that is, as payment under the original lease contract, he affirms that the lease is still in existence, and thereby waives a forfeiture that he has elected to enforce."
>
> *Jones v. Maria,* 48 Cal. App. 171.

> "The authorities are uniform to the effect that the forfeiture of a lease for breach of covenant, with full knowledge thereof on the part of the lessor is waived by acceptance of rent which accrues after the breach. (*Jones v. Maria,* 48 Cal. App. 171 (191 Pac. 943); *Inman v. Schecher,* 86 Cal. App. 193 (260 Pac. 605); 15 *Cal. Jur.* 787, sec. 205; * * *."
>
> *Keating v. Preston,* 42 Cal. App. (2d) 110, 121.

Conclusion.

In their brief, Appellees of Wells No. 2 and 4 argue that they accepted the plan with the understanding that the only thing that was called into question was waiver by conduct prior to the commencement of the bankruptcy proceedings. The record is barren of any support of the statement that these appellees accepted the plan with any definite understanding, or that they accepted the plan at all. It will be evident from the record that provision was made in the plan for priority only to such of the landowners as had acquired a right of forfeiture. It is apparent also that the provisions of the plan were drafted in such a manner as to constitute the plan "fair, equitable and feasible," as required by section 366 of the Bankruptcy Act of 1938. It would have been unfair to have preferred landowners who did not possess the immediate right of forfeiture, in view of the fact that their status in ordinary bankruptcy would have been that simply of unsecured creditors. It would have been unfair to the other unsecured creditors of this estate to have provided for full payment to such holders of landowners' royalties as had no prior claim against the assets of this estate. It is only where the landowner has the option to terminate a valuable executory contract that it would be fair to afford prior payment to such landowner. Collier on Bankruptcy, 14 Ed., Vol. 8, p. 1184.

Under the revised plan of arrangement, unsecured creditors received dividends for their claims in the form

of the stock of El Segundo Oil Company to which company was transferred all of the assets of the debtor corporation. The value of such stock to the holders thereof would be reduced by affording priority to these appellees. The revised plan merely provided that only where such appellees had perfected a right of forfeiture that they should receive priority and thus diminish the dividend to the unsecured creditors at large. It was for this reason that conditions were attached whereunder landowners' royalties would be preferred and not otherwise. These conditions were (1) that they had acquired the right of forfeiture and (2) that such right had not been waived either in conduct or otherwise. Examining the evidence, we find that the appellees failed to meet the very first condition. Their royalties did not carry with them the right of forfeiture because they failed to comply with the very first step necessary to create the right of forfeiture, to-wit, the giving of notice of default required by the leases. The evidence reveals that under the second condition the appellees could not qualify for the priority that they sought. Any rights of forfeiture that might have arisen had they given proper notice was waived by their acceptance of current royalties from the receiver. It was also waived by the conduct of the appellees in recognizing the subsistence of the lease and permitting the receiver and the debtor to operate in reliance upon the fact that the leases were not being forfeited. The evidence reveals that the receiver borrowed money and improved the property after notice to the landowners, and no steps were

taken by the landowners to deny the subsistence of the lease or to notify the debtor or its receiver that there was any intention to declare a forfeiture [R. 113 to 117, inclusive]. Having failed to qualify themselves for the preferred role that they seek, we feel the court below should have relegated the claims of the appellees to the status of unsecured creditors. We respectfully urge such direction from this Court.

Respectfully submitted,

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No. 10594

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN MESA OIL CORPORATION and EL SEGUNDO OIL COMPANY,

Appellants,

vs.

EDLOU COMPANY *et al.,* Landowners in El Segundo Community Lease No. Four-A; EDLOU COMPANY *et al.,* Landowners in El Segundo Community Lease No. Two-B; A. A. MCCRAY, Trustee for holders of overriding royalties in El Segundo Community Lease No. Four-A; A. A. MCCRAY, Trustee for holders of overriding royalties in El Segundo Community Lease No. Two-B; A. A. MCCRAY, WM. H. RAMSAUR and F. R. C. FENTON,

Appellees.

PETITION FOR REHEARING.

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Appellees.

PETITION FOR REHEARING.

Come now Western Mesa Oil Corporation and El Segundo Oil Company, appellants hereunder, and respectfully petition this Honorable Court for a rehearing of the issues involved in the above entitled appeal, based upon the following grounds:

Point I.

THE COURT'S DECISION MISINTERPRETS THE PLAN OF ARRANGEMENT AND GIVES TO IT A MEANING FOREIGN TO THAT WHICH WAS INTENDED BY THE DEBTOR. THE PLAN OF ARRANGEMENT CONTEMPLATED A DETERMINATION OF THE STATUS OF LANDOWNERS' ROYALTIES RATHER THAN A DEFINITION OF THEIR RIGHTS.

Point II.

THE PLAN OF ARRANGEMENT, AS CONSTRUED BY THE COURT'S DECISION, VIOLATES SECTION 366(3) OF THE BANKRUPTCY ACT OF 1938. THE COURT'S DECISION CONSTITUTES A DANGEROUS PRECEDENT BY HOLDING THAT THE DEBTOR, UNDER CHAPTER XI, MAY PREFER ONE GROUP OF UNSECURED CREDITORS OVER ANOTHER GROUP OF UNSECURED CREDITORS, EVEN THOUGH SUCH DISCRIMINATION IS NEITHER FAIR NOR EQUITABLE.

Point III.

THE EFFECT OF THE COURT'S DECISION IS TO HOLD THAT THE CREDITORS, TRUSTEE AND RECEIVER OF A DEBTOR ESTATE MAY BE ESTOPPED BY CONDUCT OF THE DEBTOR AFTER THE COMMENCEMENT OF THE BANKRUPTCY PROCEEDING FROM RAISING VALID OBJECTIONS TO THE ALLOWANCE AND PROVABILITY OF CLAIMS OF CREDITORS.

Point IV.

THE COURT'S DECISION OVERLOOKS THE VITAL FACT THAT, IRRESPECTIVE OF THE PROVISIONS OF THE PLAN OF ARRANGEMENT, THE RECEIVER AND CREDITORS WERE EXPRESSLY VESTED BY THE ORDER OF CONFIRMATION WITH THE RIGHT TO RAISE ANY OBJECTIONS TO THE ALLOWANCE OF THE CLAIM OF ANY CREDITOR.

Point V.

THE COURT'S DECISION CONFLICTS WITH ESTABLISHED LAW OF THE STATE OF CALIFORNIA KNOWN AS THE DOCTRINE OF *BOONE V. TEMPLEMAN.*

POINT I.

The Court's Decision Misinterprets the Plan of Arrangement and Gives to It a Meaning Foreign to That Which Was Intended by the Debtor. The Plan of Arrangement Contemplated a Determination of the Status of Landowners' Royalties Rather Than a Definition of Their Rights.

The underlying theory of the decision of this Honorable Court improperly assumes that the plan of arrangement in this case constituted an offer to the holders of landowners' royalties whereby the Debtor solicited acceptances from these persons on the promise that they would be paid in full if they consented to such plan of arrangement. Thus this Court in its opinion and immediately before quoting the paragraph of the plan that deals with the matter of landowners' royalties, says: "The debtor proposed a plan of arrangement *and to secure the consent of these unsecured claimants* the plan included the following provision: * * *."

The assumption is unwarranted by the record. At no time did the Debtor solicit consents from the holders of landowners' royalties, nor were consents ever filed by such holders. The holders of landowners' royalties were either (1) unsecured creditors affected by the plan, or (2) priority claimants who were required to be paid in spite of the plan. The plan called upon the bankruptcy court to *determine* whether the holders of landowners' royalties were in the one class or the other. The plan of arrangement did not *define* the status of these claimants. It merely called for the *determination* of their status. The decision of the Court thus serves the purpose of defeating one of the important objectives of the plan of arrangement, to wit:

the determination of the status of the claims of the holders of landowners' royalties.

This Court's decision is that the phrase "landowners' royalties which carry with them the right of forfeiture of the oil and gas leases" does not refer to an *acquired* right of forfeiture. In rejecting the contention of the appellants, the Court states that it considers the words "landowners' royalties" to mean "landowners' royalty agreements" and not the moneys paid under the agreements. No sound basis for this conclusion of the Court is afforded by the record. In effect the Court's decision serves as a rewriting of the plan of arrangement by the Court. Any doubt that the term "landowners' royalties" referred to royalty "payments" and not "agreements," is avoided by the sentence immediately following the one in question:

> "Where * * * the facts disclose * * * the landowners * * * have legally waived the right of forfeiture as to any of the *unpaid royalties,* the same will be * * *." [R. 81.]

Here the royalties are expressly referred to as unpaid royalties.

Why, then, was the particular language used? Inasmuch as it was conceivable that certain of the delinquent royalties did not carry with them the right of forfeiture, as, for instance, where notice of forfeiture as required by the lease had not been given, the plan provided that only as to such royalties which carried the right of forfeiture (obviously meaning perfected rights of forfeiture) and where there had been no waiver of such right, was payment to be made in full.

In interpreting the plan of arrangement, the Court should be governed by the rules that govern the interpretation of any writing. The Court should act *realistically*

and place itself as much as possible in the position of the parties themselves and interpret the writing in such manner as is most consistent with the actual facts surrounding its creation. When the plan of arrangement in this case was proposed, the Debtor was insolvent. Being insolvent, it was under a duty to be *just* to its creditors, and to refrain from affording one creditor an advantage over another creditor of the same class. The keynote of bankruptcy law is "Equity is equality." In a straight bankruptcy proceeding, the landowners' royalty holders were nothing else but unsecured creditors unless they had *acquired* the right of forfeiture and thus enabled themselves to lay claim to the title of the oil leases. Being insolvent, there was no reason why the Debtor should or could have been more generous to one group of creditors over another if in ordinary bankruptcy both groups would have occupied a position of parity.

In arriving at its decision, the Court appears to have been influenced by the use of the word "carry," and the Court makes the observation in its opinion that "it is only the agreements which could 'carry' the provisions respecting the right of forfeiture." It was unnecessary for the Court to speculate on this question. There were no royalty agreements involved, and the only forfeiture provisions involved were those that were incident to the oil and gas leases themselves. These leases contain forfeiture provisions on the non-payment of the monthly royalties, giving to the lessors the right to their forfeiture by a 90-day written notice followed by non-payment during the ninety days. If the Court places itself in the position of the parties herein, it will understand that the insolvent Debtor, being charged with a duty to prepare a plan of arrangement which would be fair, equitable and feasible, drafted the plan for the purpose of establishing a yardstick for

the measurement of the rights of certain of its creditors whose rights were uncertain. The Debtor determined that its stockholders had no equity, and that based upon the value of its assets, it could sell the same to a new corporation which would be willing to pay twenty cents on the dollar to the unsecured creditors and payment in full of such persons who were entitled to priority. The holders of landowners' royalties constituted a class of claimants who asserted right to payment in full because they claimed that they had the right to forfeit the leases. It was logical, then, that the Debtor in its plan of arrangement would say that it would pay in full such landowner royalty holders whose rights carried ("included" might have been a better word) the right of forfeiture, otherwise to treat such landowners' royalties in the position of unsecured creditors.

If the intention of the wording was such as is now attributed to it by this Court, then the language used was entirely unnecessary. It is conceded that *all* of the leases contained the same forfeiture provisions. If the language "landowners' royalties which carry with them the right of forfeiture" did not refer to an acquired right of forfeiture but merely to the existence of forfeiture clauses, then it was entirely unnecessary to have used the language at all because the Debtor certainly knew that *all* of the leases contained forfeiture clauses. Language contained in a document should be construed as having been used intentionally and purposefully. If intentional, it could have had but one meaning, and that is it was a reference to whether or not the right of forfeiture had been *acquired*. It was entirely conceivable to the Debtor at the time that some of the landowners' royalty holders might have acquired the right of forfeiture whereas others might not have acquired such right. It is inconceivable that the

parties using this language were merely referring to whether or not the leases contained forfeiture provisions.

To understand why the plan of arrangement referred to acts of waiver occurring *prior* to the commencement of the bankruptcy proceedings and did not refer to acts of waiver thereafter, the Court must take into consideration the rule that the date of the commencement of the bankruptcy proceedings is the date of cleavage, and all rights of the bankrupt and the trustee are measured as of the date of the commencement of the proceedings. Section 70 of the Bankruptcy Act defines the title of a trustee of an estate of a bankrupt as vesting "as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this act * * *." The rights and powers of a trustee are determined by the status of the date of the commencement of the proceeding. (*Lockhart v. Garden City Bank & Trust Co.* (C. C. A. 2, 1940), 116 Fed. (2d) 658. It was logical, therefore, for the Debtor's plan to refer only to acts prior to the commencement of the bankruptcy proceeding.

This, however, did not serve to eliminate the question of acts of waiver that may have occurred subsequent to the commencement of the bankruptcy proceeding. This very Circuit has held that where a conditional sale vendor files and proves a claim in bankruptcy, he waives the right to reclaim the property. (*In re Pilsener Brewing Co.*, 79 Fed. (2d) 63.) By recognizing the continued existence of the leases in question through their acceptance of royalties and their failure to apply for the right to enforce a forfeiture, the holders of the landowners' royalties effected a waiver of such right. Cases supporting this contention are cited in our Opening and Reply Briefs.

POINT II.

The Plan of Arrangement, as Construed by the Court's Decision, Violates Section 366(3) of the Bankruptcy Act of 1938. The Court's Decision Constitutes a Dangerous Precedent by Holding That the Debtor, Under Chapter XI, May Prefer One Group of Unsecured Creditors Over Another Group of Unsecured Creditors, Even Though Such Discrimination Is Neither Fair nor Equitable.

The Court cites Sections 306, 351, 356 and 357 of the Bankruptcy Act as authority that an arrangement may give priority to one class of unsecured claims over another class of unsecured claims. We do not disagree with this conclusion, provided that the Court recognizes the effectiveness of subdivision (3) of Section 366, which provides that before the Court can confirm an arrangement it must be satisfied that the arrangement "is fair and equitable and feasible." The plan of arrangement may not give preference to one group of creditors over another unless there is substantial reason so to do. A plan which gives an advantage to one group of creditors over another "violates the principle of parity of treatment required by section 366(3)." (*Lane v. Haytian Corporation of America* (C. C. A. 2, 1941), 117 Fed. (2d) 216, 220.)

> "Beyond that is the question of unfair discrimination to which we have adverted. Compositions under chap. IX, like compositions under the old sec. 12, envisage equality of treatment of creditors. Under that section and its antecedents, a composition would not be confirmed where one creditor was obtaining

some special favor or inducement not accorded the others, whether that consideration moved from the debtor or from another. *Re* Sawyer (D. C.), 2 Low, Dec. 475, Fed. Cas. No. 12,395; *Re* Weintrob (D. C.), 240 F. 532, 39 Am. Bankr. Rep. 407; *Re* M. & H. Gordon (D. C.), 245 F. 905, 40 Am. Bankr. Rep. 301. As stated by Judge Lowell in *Re* Sawyer, *supra,* 'If a vote is influenced by the expectation of advantage, though without any positive promise, it cannot be considered an honest and unbiased vote.' That rule of compositions is but part of the general rule of 'equality between creditors' (Clarke v. Rogers, 228 U. S. 534, 548, 57 L. ed. 953, 959 S. Ct. 587, 30 Am. Bankr. Rep. 39) applicable in all bankruptcy proceedings. That principle has been imbedded by Congress in chap. IV by the express provision against unfair discrimination."

American United Mutual Life Ins. Co. v. City of Avon Park (1940), 311 U. S. 138, 61 S. Ct. 157, 85 L. Ed. 91.

(The reasoning applicable to Chapter *IX* is equally applicable to Chapter *XI.*)

The effect of the Court's decision now is to ignore the applicability of Section 366(3) and thus to give sanction to discriminating differentiations unauthorized by Chapter XI. We are confident that the Court will, upon giving additional consideration to the effect of its decision and the failure to consider Section 366(3), grant a rehearing to avoid the inequity of the present decision.

POINT III.

The Effect of the Court's Decision Is to Hold That the Creditors, Trustee and Receiver of a Debtor Estate May Be Estopped by Conduct of the Debtor After the Commencement of the Bankruptcy Proceeding from Raising Valid Objections to the Allowance and Provability of Claims of Creditors.

This Court's decision serves as a vehicle for a debtor, under Chapter XI, to deprive its creditors from their vested right of objecting to the allowance of the claims of creditors.

Objections to the allowance of claims are made under Section 57(f) of the Bankruptcy Act of 1938. This section is a part of Chapter VI of such Act. Section 302 provides that the provisions of Chapters I to VII, inclusive, of the Bankruptcy Act shall be applicable to proceedings under Chapter XI except in so far as they may be inconsistent with or in conflict with the provisions of such chapter. Section 57 is, therefore, a part of Chapter XI. See *Collier on Bankruptcy,* 14th Ed., pp. 973 to 976.

Bearing in mind that the effect of this Court's decision is to permit the insolvent Debtor to prevent its creditors from objecting to the allowance of the claims of certain unsecured creditors as priority claimants, we are faced with an upheaval of established principles of bankruptcy law.

It has been held that a bankrupt, being insolvent, should not be entitled to object to the allowance of claims of creditors.

> *Gregg Grain Co. v. Walker Grain Co.* (C. C. A. 5), 258 Fed. 156, cert. den. 262 U. S. 746, 43 S. Ct. 522, 67 L. Ed. 1212.

There appears to be some authority to the effect that the bankrupt, *in addition* to the creditors, may object to the allowance of claims. In no case have we found any indication that the bankrupt has as much as a right equal to the creditors to object to claims, much less a superior right, as appears to be the result of this Court's decision. In this case there was no trustee, but the receiver acted as the representative of the creditors. His functions were similar to those of a trustee. A trustee has almost an exclusive right to object to claims on behalf of creditors. Under Section 47(a)(8) of the Bankruptcy Act (which by virtue of Section 302 is made applicable to Chapter XI), a trustee (receiver in this case) is under a statutory duty to "examine all proofs of claim and object to the allowance of such claims as may be improper."

In this case the Court has shifted the right of objecting to claims from the real parties in interest, to wit: the creditors, to the Debtor. In this result, the decision becomes a precedent laden with danger.

No act of the Debtor, particularly after the commencement of the bankruptcy proceedings, should have the effect of estopping the receiver as the representative of the creditors from asserting any valid objection to the allowance of any claim. Thus, for instance, in the case of *In re Continental Engine Co.,* 234 Fed. 58 (C. C. A. 7), it was held that the valuation of a claim in a proceeding for adjudication "cannot estop the Trustee acting on behalf of all creditors or any non-assenting creditors from denying the validity and provability of * * * (the) claim." This view received the approval of the Circuit Court of Appeals for the Second Circuit. (*In re Matter of Brown,* 118 Fed. (2d) 198.) It has been held that the estoppel of the bankrupt does not serve to estop the trustee

in bankruptcy, a trustee in bankruptcy being estopped only when all of the creditors are estopped. (*Earhart v. Valerius* (D. C., Mo.), 25 Fed. Supp. 754.)

Can it be said that in its plan of arrangement the Debtor has divested the bankruptcy court of jurisdiction to determine the allowability of the claim of the appellees? The matter of determining the status of claims and protecting creditors from unfair discrimination amongst them in the distribution of an estate is exclusively the power of the bankruptcy court. (*Bankruptcy Act of 1938,* Sec. 57.) To say that the Court can be deprived of that power by an act of the Debtor, is to place a control in the hands of the Debtor whereby the essential jurisdiction of the bankruptcy Court is defeated. Under the authority of the leading case of *Isaacs v. Hobbes Tie & Timber Co.,* 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 671, a procedural attempt upon the part of the Trustee was held to be futile in so far as it could have the effect of divesting the bankruptcy court of jurisdiction which is exclusive to it. Applying the same reasoning, the acts of the Debtor in this case should not be permitted to enable the Debtor to function in lieu of the Court in passing upon the considerations that determine whether or not a claim is entitled to priority. The United States Supreme Court in *Isaacs v. Hobbes Tie & Timber Co., supra,* made it clear that a trustee has no right to waive the jurisdiction of the bankruptcy court. By the same token, the Debtor in this case was powerless to divest the bankruptcy court of its jurisdiction.

POINT IV.

The Court's Decision Overlooks the Vital Fact That, Irrespective of the Provisions of the Plan of Arrangement, the Receiver and Creditors Were Expressly vested by the order of Confirmation With the Right to Raise Any Objections to the Allowance of the Claim of Any Creditor.

In the order of confirmation, the bankruptcy court below expressly provided that the bankruptcy court would determine what claims would be entitled to priority. [R. 97.]

The order of confirmation further provided "that the Debtor or any party in interest, including the new corporation, the El Segundo Oil Company, shall have the right to object to the allowance of any claims filed herein, and such claims so objected to shall participate in the revised plan of arrangement hereby confirmed only on the basis of the amount of such claims as may be finally allowed by this court." [R. 98.] If the Debtor actually had estopped itself from asserting as grounds of objection to the priority allowance of the claims of appellees any conduct of the appellees occurring subsequent to the commencement of the bankruptcy proceedings, certainly the creditors and the receiver still had the right to so object, and the order of confirmation included a confirmation of the continued existence of that right. The proceeding for the determination of the rights of the holders of landowners' royalties was brought on by the receiver and the Western Mesa Oil Corporation as an unsecured creditor. [R. 51.] The petition set up the matter of determining the rights of

landowners' royalties in the light of their acceptance of current royalty payments from the receiver.

> "In connection with the administration of the Debtor's estate and the consummation of the said revised plan of arrangement, it is necessary that the status and rights of the holders of the said unpaid landowners' royalties be determined by this Court. All current landowners' royalties under the said leases, arising since the commencement of this bankruptcy proceeding, have been paid." [R. 53.]

The question was raised as to whether or not this conduct that occurred subsequent to the commencement of the bankruptcy proceeding was properly in issue before the Referee, and the proceeding was tried on the theory that such conduct had been put into issue. [R. 165, 189, 218.] The Referee made findings with respect to such conduct. [R. 70.]

It should be noted also that the right of persons other than the Debtor to object to claims was recognized and affirmed by the plan of arrangement itself. Thus the plan also provided that:

> "If * * * there appear to be any objectionable claims filed, the Debtor, or any party in interest, including the new corporation, shall have the right to object to the allowance of the same, and such alleged creditors shall participate in the plan as confirmed, only on the basis of the amount of their claims as may finally be allowed by this Court." [R. 84.]

POINT V.

The Court's Decision Conflicts With Established Law of the State of California (Known as the Doctrine of Boone v. Templeman).

In California, it is well established that once there has been an acceptance of payment not made punctually, the right of forfeiture is suspended until restored by the giving of a specific notice of intention to enforce it thereafter.

Boone v. Templeman, 158 Cal. 290;
Stevenson v. Joy, 164 Cal. 279;
Hoppin v. Monsey, 185 Cal. 678;
LeBallister v. Morris, 59 Cal. App. 699;
Wetherby v. Sinn, 73 Cal. App. 98;
Pearson v. Brown, 27 Cal. App. 125;
Miller v. Modern Motor Car, 107 Cal. App. 42;
Lafoon v. Collins, 212 Cal. 750.

Viewing the Court's decision most favorably to the appellees, we cannot yet escape the fact that the Court's decision does violence to the foregoing rule. If the rights of the appellees included the right of forfeiture, it was only a suspended right of forfeiture which could be restored only in the manner described in the foregoing cases. The record discloses no restoration of these suspended rights. Therefore, appellees could not possibly qualify as holders of landowners' royalties "which carried the right of forfeiture."

Conclusion.

The payment to one class of creditors of 20% of their claims in the face of the payment to another class of creditors with no greater legal rights of 100% of their respective claims, is an obvious discrimination in favor of the latter against the former group. This result was unintended by the Debtor in this case. But even if the Court does not adopt our construction of the plan, and whether the Debtor is estopped or not, the creditors discriminated against should certainly have the right to object to the discrimination. The effect of the decision of this Court has been to eliminate the element of fairness required by Section 366(3) of the Bankruptcy Act as an essential feature of a plan of arrangement and serves to permit a Debtor to estop the real parties in interest, the creditors, from asserting their vested rights. It permits the debtor to deprive the Court of its exclusive jurisdiction to pass upon the allowance of claims of creditors. We respectfully urge this Court to reexamine its decision and grant a rehearing thereof.

Respectfully Submitted,

RAPHAEL DECHTER and

HARRY A. PINES,

Attorneys for Appellants.

Certificate.

We do hereby certify that, in our judgment, the foregoing petition for rehearing is well founded and we do further certify that said petition is not interposed for the purpose of delay.

RAPHAEL DECHTER,
HARRY A. PINES,
Attorneys for Appellants.

No. 10616

United States
Circuit Court of Appeals

For the Ninth Circuit.

CLAIBOURNE RANDOLPH TATUM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 590 Folsom St., San Francisco

No. 10616

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CLAIBOURNE RANDOLPH TATUM,
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San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California.

INDICTMENT—No. 28085 R

(Section 11, Selective Training and Service Act of 1940; 50 U.S.C.A. Section 311)

In the July 1943 term of said Division of said District Court the Grand Jurors thereof on their oaths present: That

CLAIBOURNE RANDOLPH TATUM,

(whose full and true name is, other than hereinabove stated, to said Grand Jurors unknown, hereinafter called "said defendant"), being a male citizen between the ages of twenty-one and thirty-six years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of the Act of Congress approved September 16, 1940, known as the "Selective Training and Service Act of 1940" and thereafter to comply with the rules and regulations of said Act, and having in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 89 of the Selective Service System in the City of San Francisco, State of California, which said Local Board No. 89 was duly appointed and acting for the area of which the said defendant is a registrant, did, on or about the 26th day of July, 1943, in the City and County of San Francisco, in the Southern Division of the Northern District of California and within

the jurisdiction of this Court, knowingly and feloniously fail and neglect to perform such duty, in that he, the said defendant, having theretofore been classified in Class I-A, did then and there knowingly and feloniously fail and [1*] neglect to comply with the order of his said Local Board No. 89 to report for induction into the land or naval forces of the United States, as provided in the said Selective Training and Service Act of 1940 and the rules and regulations made pursuant thereto.

FRANK J. HENNESSY
United States Attorney.

Approved as to form:
R. B. McM.

A true bill,
PEARSON HENDERSON,
Foreman.

[Endorsed]: Presented in Open Court and Ordered Filed Aug. 24, 1943. C. W. Calbreath, Clerk. By J. A. Schaertzer, Deputy Clerk. [2]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco,

*Page numbering appearing at foot of page of original certified Transcript of Record.

on Wednesday the 25th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable A. F. St. Sure, District Judge, Sitting for and on Behalf of Honorable Michael J. Roche, District Judge.

No. 28085-R.

UNITED STATES OF AMERICA,

vs.

CLAIBOURNE RANDOLPH TATUM.

ARRAIGNMENT AND PLEA

This case came on regularly this day for arraignment. The defendant Claibourne Randolph Tatum was present with his attorney Wayne Collins, Esq. Joseph Karesh, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

On motion of Mr. Karesh, the defendant was called for arraignment. The defendant was informed of the return of the Indictment by the United States Grand Jurors, and asked if he was the person named therein, and upon his answer that he was, and that his true name was as charged, said defendant was informed of the charge against him and stated that he understood the same. Mr. Collins waived the reading of the Indictment.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty" to

the Indictment [3] filed herein against him, which said plea was ordered entered.

The defendant and the attorneys for both parties, in open Court, demanded a trial by jury.

After hearing the Attorneys, it is ordered that this case be continued to September 14, 1943 to be set for trial. [4]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find as to the defendant at the bar as follows:

Guilty.

LAWRENCE J. DAVITT
Foreman.

[Endorsed]: Filed Nov. 17, 1943. [5]

District Court of the United States
Northern District of California
Southern Division

UNITED STATES

v.

CLAIBOURNE RANDOLPH TATUM

No. 28085-R Criminal Indictment in One count for violation of Section 11, Selective Training and Service Act of 1940; 50 U.S.C.A. Section 311.

JUDGMENT AND COMMITMENT

On this 17th day of November, 1943, came the United States Attorney, and the defendant Claibourne Randolph Tatum appearing in proper person, and by counsel and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to-wit: Viol. of Section 11, Selective Training and Service Act of 1940; 50 U.S.C.A. Section 311—defendant, did, on or about July 26, 1943, in San Francisco, California, fail and neglect to comply with the order of his Local Board No. 89 to report for induction into the land or naval forces of the United States; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Three (3) Years:

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) MICHAEL J. ROCHE
United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Examined by; Joseph Karesh, Asst. U. S. Atty.
Entered in Vol. 34 Judg. and Decrees at Page 72.

[Endorsed]: Entered and Filed this 17th day of November, 1943. [6]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and addres of Appellant: Claibourne Randolph Tatum, San Francisco, California.

Offense: Violation of Selective Training and Service Act of 1940.

Date of Judgment: November 17, 1943.

Brief description of judgment or sentence: Three years Sentence.

Name of prison where now confined: San Francisco County Jail.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Dated: November 17, 1943.

CLAIBOURNE R. TATUM
Appellant.

GROUNDS OF APPEAL:

I. The judgment abridges the defendant's freedom of religion and freedom of conscience in violation of the First Amendment to the United States Constitution.

II. The judgment abridges the defendant's liberty without due process of law in violation of the Fifth Amendment of the United States Constitution, in that the defendant was denied a fair hearing by and before his local draft board and by the special assistant to the Attorney General, the Hearing Officer, in the following particulars:

1. The local draft board did not accord to the defendant the right to a personal appearance as required by paragraph 625.1 and 625.2 of the Selective Service Regulations, [7] in that the defendant was not given an opportunity to present his case supporting his claim for a classification as a minister and as a conscientious objector; and in that said local board did not consider evidence thereafter submitted by the defendant in support of his claim,

and said local board did not make an order of classification thereupon, as required by said Regulations.

2. Before said Hearing Officer, in that the defendant was not accorded an opportunity to present his claim before said Hearing Officer, and was not given an opportunity to meet, nor was he advised, of any adverse evidence against him, in violation of paragraph 627.25 of the Selective Service Regulations and the memorandum of the Attorney General of the United States; and said Hearing Officer's report was made as the result of reliance upon such evidence.

3. The reviewing authorities in the Selective Service System in connection with an appeal to the President of the United States, are military officers in violation of Section 10 (a) (2) of the Selective Training and Service Act.

III. The Court erred in refusing to grant defendant's motion for new trial.

IV. The Court erred in refusing to grant defendant's requested instructions as excepted to.

V. The Court erred in giving instructions submitted by the prosecution as excepted to by defendant.

VI. The Court erred in ruling upon evidence.

VII. The evidence was insufficient to justify the verdict, or a conviction.

VIII. Misconduct by the United States Attorney.

THEODORE TAMBA
511 Mills Building,
San Francisco, California [8]
A. L. WIRIN
257 S. Spring Street
Los Angeles, California
By A. L. WIRIN
Attorneys for Appellant.

(Receipt of Service.)

[Endorsed]: Filed Nov. 18, 1943. [9]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday the 23rd day of November, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28085-R.

COURT'S INSTRUCTIONS RE RECORD ON APPEAL

This case came on regularly this day for hearing the Court's instructions regarding the preparation of the record on appeal. After hearing Joseph Karesh, Esq., Assistant United States Attorney, on behalf of the United States, and Theodore Tamba, Esq., on behalf of the defendant, it is Ordered that the defendant may have to December 9, 1943 to prepare his proposed Bill of Exceptions and that the United States may have to December 20, 1943 to file its proposed Amendments.

Further ordered that this case be continued to December 20, 1943 for settlement of the Bill of Exceptions. [10]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday the 9th day of December, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28085-R.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS, ETC.

On motion of Wayne Collins, Esq., on behalf of the defendant, and with the consent of Joseph Karesh, Esq., Assistant United States Attorney, it is ordered that the defendant may have to December 14, 1943 to prepare his proposed Bill of Exceptions and that the United States may have to Deecmber 29, 1943 to file its proposed Amendments.

Further ordered that this case now on the calendar for December 20, 1943 be continued to December 29, 1943 for settlement of the Bill of Exceptions. [11]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday the 29th day of December, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28085-R.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS, ETC.

This case came on regularly this day for the settlement of the Bill of Exceptions. With the consent of Wayne Collins, Esq., Attorney for defendant, it is Ordered that the United States may have to January 8, 1944 within which to file its proposed Amendments to Bill of Exceptions.

Further ordered that this case be continued to January 8, 1944 for settlement of the Bill of Exceptions.

Mr. Collins made a motion to release the defendant on bail pending the appeal, and after hearing the arguments of Mr. Karesh and Mr. Collins, it is ordered that said motion be denied. [12]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday the 8th day of January, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

No. 28085-R.

ORDER SETTLING BILL OF EXCEPTIONS

This case came on regularly this day for settlement of the Bill of Exceptions. With the consent of Joseph Karesh, Esq., Assistant United States Attorney, and Theodore Tamba, Esq., on behalf of defendant, it is Ordered that the Bill of Exceptions be settled and filed in the form this day presented.

[13]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS

Be It Remembered that the above-entitled cause came on for trial by jury before the Honorable Michael J. Roche, United States District Judge presiding, on the 15th day of November, 1943.

The plaintiff appeared by Frank J. Hennessy, Esq., United States attorney, and Joseph A. Karesh, Assistant United States attorney, and the defendant appeared in person and with counsel, A. L. Wirin, Theodore Tamba and Wayne M. Collins, Esquires, whereupon the plaintiff to maintain the issues on its part to be maintained, called Olin Wells as its first witness.

TESTIMONY OF OLIN WELLS

Olin Wells, called as a witness on behalf of the plaintiff, [14] being first duly sworn, testified as follows:

I am the chief clerk of Local Board 89 of the Selective Service System at San Francisco, California. I have the care, custody and control of the records of the Board and am in charge of the correspondence of the Board. The defendant regis-

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Note: Each of the Exhibits referred to in this Bill of Exceptions was duly identified by the witness in whose recital of testimony it appears herein, was admitted into evidence and was read to the jury.

[Printer's Note: These Exhibits are set out in full, starting at page 77 of this printed record.]

(Testimony of Olin Wells.)

tered (U.S.Exh.1) under the Selective Training & Service Act of 1940 and on May 17, 1941, filed his verified Selective Service Questionnaire, DSS Form 40, (U.S.Exh.2) with said board. In said questionnaire defendant declared that he was a native born citizen of the United States, 29 years of age; that he was a high school graduate and had a fine arts training in various fine arts institutions; that he was an artist by profession and was employed as an artist by the W.P.A. at a salary of $21.00 per week; that he was married and that his wife, owing to a back injury and a past incipient arthritic condition and lack of training was unprepared for employment and was wholly dependent upon him for her support. The defendant did not claim to be a student preparing for the ministry or a minister. The defendant did not claim exemption therein as a conscientious objector either to combatant or noncombatant military service by reason of religious training or belief and did not request therein that he be supplied with a conscientious objector's form. On July 7, 1941, defendant was given a #3 classification by Local Board 89. On February 27, 1942, the Board classified defendant as #1, that is, as potentially available for service in the armed forces. On March 25, 1942, the Board mailed Form C.S.F. No. 1 to defendant to obtain present information for the Board. On April 23, 1942, defendant was ordered for a screening and serologic test before the local board physician. The Board received a letter dated April 6, 1942, (U.S.Exh.3), from the defendant in which he requested a hearing by the Board

(Testimony of Olin Wells.)

which was granted and the defendant had a personal hearing before the Board on June 8, 1942, as shown by the entry in the Board's Form 100 [15] Book (U.S.Exh.5). On June 1, 1942, the Board mailed to the defendant DSS Form 47, Special Form for Conscientious Objectors, (U.S.Exh.6), which the defendant filled out and filed with the Board on June 5, 1942, claiming therein exemption from combatant and non-combatant military and naval service upon the ground that he was by religious training and belief opposed to participation in war in any form and to participation in any service under the direction of military authorities.

U. S. Exhibit No. 2 carries a notation of the Board under date of July 9, 1942, that defendant was classified in Class 3, Group 2. It also carries a notation under date of November 3, 1942, that the defendant was ordered for a screening and serologic test before the local board's physician. It also carries a notation under date of November 10, 1943, that the defendant, after said test, was classified 1-A by said Board by a vote of 4 to 0 and that on the evening of said day that the Board reconsidered the classification and thereupon reclassified him 1-AO, that is, as a registrant who objects, on conscientious grounds, to combatant but not to non-combatant military service, the defendant not being present at the time said classifications were made. On November 16, 1942, the Board received a letter dated November 13, 1942, (U.S.Exh.7), from the defendant in which he requested a personal appearance before the Board. This request was granted as shown in

(Testimony of Olin Wells.)
the Board's Form 100 Book (U.S.Exh.8) and the defendant was given a hearing by the Board on November 20, 1942. The Board's minutes reflect that the Board sent defendant a notice of his 1-AO classification on November 10,1942, and that after the hearing on November 20, 1942, the Board continued him in class 1-AO and mailed him a DSS Form 57, a notice of said classification. On November 27, the Board received a letter (U.S.Exh.9) from the defendant dated [16] November 24, 1942, protesting the said classification and requesting that the classification 4-D be given to him as a minister.

The defendant appealed in writing from his classification on November 20, 1942, to the Board of Appeal. Local Board 89's file contains a report of the hearing conducted by the Department of Justice pursuant to Sec. 5(g) of the Selective Training and Service Act of 1940 which was signed by Hugh McKevitt, the hearing officer. This report is dated April 9, 1943, and reflects that notice of the hearing was given to the defendant on March 20, 1943, and that the hearing was held on March 30, 1943. The minutes of the Board of Appeal show that on January 22, 1943, it reviewed the defendant's file and determined that he should not be classified as 1-C, 4-D, 3-A, 4-F, 4-C, 4-B, 4-A, 3-B, 2-B, 2-A or 1-H. Thereafter on June 1, 1943, the records reflect that the Board of Appeal decided that the defendant was not entitled to be classified as a conscientious objector.

The records of Local Board 89 show that on June

(Testimony of Olin Wells.)

1, 1943, defendant was classified 1-A by the Board of Appeal by a vote of 3 to 0. Local Board 89 mailed the DSS Form 57, a notice of the classification, of the Appeal Board on June 16, 1943, to the defendant. On June 30, 1943, the Local Board received a letter (U.S.Exh.10) dated June 29, 1943, from the defendant. On July 10, 1943, the Board sent defendant a notice (U.S.Exh.11) to report on July 26, 1943, for induction into the land and naval forces of the United States. The defendant did not report for induction. Thereafter, on July 26, 1943, the Board mailed him a notice of delinquency, DSS Form 281, (U.S.Exh.12) and thereafter, on July 31, 1943, received from him a letter (U.S.Exh.13), dated July 30, 1943, relating to the notice of delinquency. Neither the State Director of the Selective Service System nor the National Director thereof ever stayed the defendant's induction. None of the members of the Board of Appeals dissented in defendant's behalf consequently the defendant could not appeal to the President. [17] Neither the State Director nor the National Director appealed on behalf of the defendant to the President.

Cross-Examination

None of the classifications which appears in notation form on the back of U.S.Exh.2 were ever requested by the defendant. I have a keen recollection of statements made by the defendant in which he expressly stated that he was not now a minister of the gospel, that he was not a speaker for Mankind United, that he merely belonged to a little organiza-

(Testimony of Olin Wells.)

tion that he called the Church of the Heart. I do not know of any evidence of the defendant having engaged in war work. The U.S.Exh.6 shows that he took an R.O.T.C. course when he was a boy. On June 8, 1942, the defendant stated to me that he was neither a teacher, a lecturer, or a minister, and that he was working at other work. (Defendant's Exh.A, the report of the Hearing Officer of the Department of Justice, was then introduced into evidence and read to the jury. Defendant's Exh.B, an affidavit of H. Brand dated November 13, 1942, produced by the witness from Local Board 89's file, was then marked for identification. Defendant's Exh.C., an affidavit of Mr. Emmons dated November 11, 1942, and the affidavits of Mr. Rader and of H. and A. Papenhausen dated November 14, 1942, were produced from Local Board 89's file and were marked Defendant's Exh.C for identification. A letter addressed to the Members of the Board of Appeal and Other Members Assigned to Determine the defendant's status under the Selective Service Act of 1940 by the defendant and dated March 25, 1943, was likewise produced from Local Board 89's file and was introduced into evidence as Defendant's Exh.D and read to the jury. In U.S.Exh.6 the defendant stated,

> "I have been engaged for the past five and one-half years promoting the interests of Christianity for the benefit of all men, and to my own professional and financial disadvantage, but to the great benefit of my conscience in the

(Testimony of Olin Wells.)

capacity of an unordained minister of the Christian philosophy.") [18]

I have no recollection of the defendant taking any view other than the view expressed in that Exhibit. On various occasions the defendant has made statements to me. He was always very friendly. He was always treated courteously. And at various times he expounded on his beliefs, religious training, and so on. Mr. Karesh thereupon offered plaintiff's Form 41 in evidence and it was admitted as U.S. Exh.14. Thereupon a letter dated December 13, 1942, signed by the defendant and addressed to Orville C. Pratt, Jr., was produced from the Local Board's file and was received in evidence as Defendant's Exh.E.) Local Board 89's entire file concerning the defendant was forwarded to the Appeal Board on December 17, 1942. (Defendant's Exhs. F and G were marked for identification.)

TESTIMONY OF JOHN J. FOLEY

John J. Foley, called as a witness for the plaintiff, being first sworn, testified as follows:

I am a member of Selective Service Local Board 89 of San Francisco and the chairman thereof. The other members of said Board are Daniel Sweeney and Michael King. We do not receive any compensation for our services. We meet twice a week from 7:30 until 11:30 P.M.

Cross-Examination

I am familiar with the defendant's case. I was

(Testimony of John J. Foley.)

not present at any of the defendant's personal appearances before Local Board 89. (Defendant's Exhs. B and C previously marked for identification were thereupon received in evidence.) These affidavits, Defendant's Exhs. B and C were not read by the members of Local Board 89 and were not used by us in classifying the defendant but were part of the appeal record. I talked to the Local Board about the 1-AO classification after it had been made. They made the 1-A classification [19] at the same meeting and then on account of the form he had filed, they decided to make him at that time 1-AO, that is, the classification of a conscientious objector eligible for non-combatant services. The Board makes his classification on the data that is in his questionnaire. He mentions in his questionnaire that he is married and supporting his wife who lives with him in the same home and so he would be classified 3-A according to the Selective Service Regulations.

Redirect Examination

The filling out of a registrant's affidavit of family status and dependency is equivalent to asking for a 3-A deferment.

TESTIMONY OF EDWARD B. REDDY

Edward B. Reddy, called as a witness for the plaintiff, being first sworn, testified as follows:

I am a special agent of the Federal Bureau of Investigation. I know the defendant. I talked to

(Testimony of Edward B. Reddy.)

the defendant in the U. S. Marshal's office on August 18, 1943, at which time he told me he had registered under the Selective Training and Service Act of 1940 at Local Board 89 in San Francisco, on October 16, 1940. He also told me then that he had filled out his Selective Service Questionnaire; that he had received notice of his 1-A classification about June 16, 1943, from the Local Board after his case had gone to the Board of Appeal; that he had received a notice to report for induction into the land and naval forces of the United States on July 26, 1943, and had not reported for induction because he felt that he was entitled to a 4-D classification and inasmuch as he had not received that classification he did not feel that he should report for induction. He also told me that he later received a notice of delinquency whereupon he had taken a letter to the Local Board in person outlining the reason he had formerly given for not reporting. He also told me he was not willing to go into the Army and that he did not feel willing to go to a conscientious objector's [20] camp under civilian direction because it would restrict his activities as a minister.

Thereupon the plaintiff rested.

TESTIMONY OF DEFENDANT CLAIBOURNE R. TATUM,

the defendant, called as a witness in his own behalf, being first sworn, testified as follows:

I was born in San Francisco where I have lived all my life. I am 30 years of age. My occupation is as follows: I am being paid for copy or proof reading but my activities likewise are those of a minister, but I am not being paid for the material that I am compiling now and the sermons which I am writing for future use. I am being paid by the Timely Books Library and have been since September of 1941 at *a* average rate of $50 per month. I am married and live with my wife in a house at 954 Ashbury Street, San Francisco, where we have resided for approximately two years. My wife does typing for me and helps me with the proof reading and does the housework. We have no source of income other than $50 per month and we manage to live thereon. My clothes were purchased before the war with the exception of the suit I am wearing and which I purchased with funds loaned to me by my sister who desired me to appear decently dressed for this appearance in Court.

I write sermons upon the principles of Christianity as taught by Christ Jesus and endeavor to analyze them in such a way that average people will be able to see the possibility of their practical application to their every day lives. I spend an average of eight to sixteen hours a day at this work and my wife assists me, spending about as much

(Testimony of Claibourne R. Tatum.)
time thereon as I do. I expect my sermons to be released in publication form or to be delivered by individuals authorized to deliver them to the public, verbally or in other manner. Prior to the time I became engaged in proofreading and the writing of sermons I was working on the W.P.A. as an artist. I have been an artist since 1930 and received my training as such at [21] the California School of Fine Arts, primarily, and I studied in the East and spent quite a little time with Guy Wiggins. I did oil paintings, still life and portraiture, and a few of my paintings were hung in the Memorial Gallery of the Palace of the Legion of Honor. I am a descendant of the Randolph and Tatum families which were among the first families of Virginia, the former being interested in the nation's political life and the latter in the agriculture life. One of the Randolphs became the Secretary of State under President George Washington and this morning a reporter of the San Francisco Chronicle informed me that he was also one of the aides of General Washington in the Revolutionary War. On my mother's side there was an ancestor, Stephen Arnold Douglas, who participated in the Revolutionary War.

I stopped working for the W.P.A. when an order was given by the government that all those on W.P.A. who were qualified should be sent to a shipbuilding school. I was assigned to attend such a school being established by the Bethlehem Ship-

(Testimony of Claibourne R. Tatum.)

building Company and attended for a week or a week and a half when I left in 1941 because I couldn't build ships because it would require the use of the very implements I would not use—implements of war, of munitions, and various other things—maybe even the building of destroyers and warships proper.

Thereafter I went to work for the Timely Books Library. I became connected with an organization known as Mankind United in August of 1936. I had been discussing the article, "Arms of Men", a synopsis of a report of the U. S. Senate of an arms inquiry, with a good number of people, among them my artist friends, and one of them drew my attention to a text-book, "Mankind United." I found the principles of Mankind United were in perfect accord with my principles about Christianity and about war. At first I merely attended lectures and discussed the text-book with interested [22] persons. In the spring of 1937 I was invited to take an active part in the lecturing program of the organization and to occupy the platform officially. My activities were to keep all my evenings available so as to be subject to call to deliver lectures on the theme of Mankind United and the principles of Christianity. My preparation for this work was attendance at meetings, study of the text-book and all related copyright material, study of the principles of Christianity as expounded by Mankind United and study of the Bible. I lectured on the average of three times per week throughout the

(Testimony of Claibourne R. Tatum.)

Bay Region and Northern California during 1937 and thereafter until the middle of 1941 on the principles and teachings of Mankind United as associated primarily with the principles of Christianity. I discussed the problems of war and the causes of war before our entry into this war. During said period of time I expressed myself in those lectures as definitely and unalterably opposed to war in any form and I am still of the same view. Before Pearl Harbor we were warning the people that war was iminent if they continued in their present way of living and nurtured the present conditions throughout the world which were leading toward conflict. And it wasn't that people should not defend themselves if we are forced to a position—we did not take it upon ourselves to instruct people as to what they should do in a state of emergency—but that the condition of war could be prevented by intelligent action.

I gave over 300 sermons between 1937 and 1941 before Pearl Harbor to audiences averaging between 50 and 100 people in which I stated that war, particularly that conflict which results in physical violence, is in exact opposition to the principles of Christianity and that those principles cannot be practically applied during a time of such violence. All during said time I considered myself a minister. I then felt and now feel that the nature of the service I and others in my capacity have been rendering is a ministerial [23] service in that we are teaching the practical application of Christian principles. I

(Testimony of Claibourne R. Tatum.)

do not believe any minister can do more. We are not formally ordained but we are definitely and have in the past dedicated our entire lives to the promulgation of the Christian principle for the purpose of expanding that principle in the lives of all people. Since 1937 I have dedicated my entire life to the preaching of the principles of Christianity, having put aside all of my personal ambitions as an artist and for a home.

At the time I filled out the Questionnaire, U. S. Exh. 2, I left the spaces blank in that section thereof entitled "Series 8" reading "Minister or student preparing for the ministry" because I didn't think it applied to me because I had no idea the Government would be considering anyone else but an ordained minister who had gone through a theological seminary and was ordained. I left the space following "Series No. 10" therein entitled "Conscientious Objection to War" blank because I then felt, because of articles appearing in the press directed against the movement of Mankind United, that persecutional action might be taken against me because of my connection with it and because of my personal views. I did not indicate on the questionnaire any desire for a particular classification because I did not believe it was my right so to do. I have never asked for a dependency classification.

When I was about 16 or 17 years of age I took an R.O.T.C. course for three semesters in high school to make up scholastic units or grades. My

(Testimony of Claibourne R. Tatum.)

views respecting war had not then crystallized. They have been the result of gradual growth.

After my first appearance before Local Board 89 I received a card notifying me that I had been placed in class 3-A2, that is, a deferment for dependency.

Originally I had a 3-A classification. Thereafter, without [24] prior notice to me, I received a 1-A classification upon the receipt of which I asked Local Board 89 for a personal hearing. I was granted the hearing. I appeared before one member of the Board and the recording Secretary on June 6, 1942, at which time I filed with the Board my conscientious objector's form (U. S. Exh. 6) which had previously been supplied to me. The Board member questioned me concerning my having worked as a student for shipbuilding and why I had quit. He also mentioned my conscientious objector's form and questioned me as to what I would do were I to see some Japanese soldier accosting a white woman in the street, and more particularly my wife. I told him it would be impossible for any person really to answer honestly a question of that kind because he would have to experience the circumstance to determine what he would do. However, I told him I knew what I would want to do, like to do in those circumstances, that is, to apply Christian principles to the best of my understanding and to realize it is far more important to be wary of those who will destroy the soul rather than only those who can destroy the body. I also told

(Testimony of Claibourne R. Tatum.)
him that I was active in a religious way directing the thought of people in the ways of the Commandments and the teachings of Christ which is the truth. I also told him I was a conscientious objector.

I am not paying rent for the place my wife and I occupy. I assisted in excavating a 12 foot deep pit at the place where I reside which was intended to be used as a bomb shelter. I do not think this is in any way inconsistent with my views about war because it is not taking part directly or indirectly in the taking of human life.

I told the board member at that time that I quit my assignment for training in the shipyard because such work was helping construct a means of destruction. I also told him that I belonged to the [25] Church of the Heart—that this church was not a building, a place or a sect but a state of man's mind with respect to Christianity, whose philosophy would spring from the Golden Rule, the Ten Commandments, and particularly that Commandment which Christ Jesus stated as being foremost: "Thou shalt love the Lord they God with all thy heart, with all thy mind, and with all thy soul," and "As a man thinketh in his heart so he is," and that Christianity does not come from the mind but comes from the heart. I believe in these principles, shall always believe them and have believed them in their intangible and embryonic phase during my entire life. I told him that I believed in the Bible, that I studied it and that I preached its principles. I

(Testimony of Claibourne R. Tatum.)
was asked by the Board if I cared to make a statement and I made the following statement:

> "I am not averse to helping save life, but I would rather have my own life taken than to take the life of another or help someone to do the same."

This statement was true when made and is true now. If it came to a choice of either my life or someone else's life I would rather run the risk of death myself than impose that upon someone else. I arrived at this view because of the Commandment, "Thou shalt not kill".

After the interview had with the Local Board member on June 8, 1942, I received from the Board a classification in Class 3 Group 2, that is, a deferment for dependency. In U. S. Exh. 6, where the words, Series No. 1, Claim for exemption appears, I claimed an exemption from both combatant and non-combatant service. I was asked by Local Board 89 whether I ever considered going into the Army as a chaplain and I stated that if such a circumstance existed in the Army or the Navy where the chaplain would be free to preach unadulterated Christianity and not take part in the war effort, as chaplains do today, I might consider that. I never requested a 1-AO classification.

I believe in the All-powerful Living God and his laws, and [26] particularly in the commandment, "Thou shalt not kill," and have so believed ever since I was 17 or 18 years of age, as I stated in

(Testimony of Claibourne R. Tatum.)

U. S. Exh. 6. I think the fact that I am an artist may have influenced the views I express. As far as my memory serves me I have believed the cardinal law of life is the Golden Rule as I stated in that exhibit. I have written about the Golden Rule in my sermons and preached that doctrine repeatedly between 1937 and 1941. I have drawn my inspiration and philosophy from life as a whole and the Bible, and particularly from the New Testament as stated in that exhibit. On June 6, 1942, prior thereto and ever since 1937, I have considered myself an unordained minister of the gospel. I did not know on June 6, 1942, that an unordained minister was entitled to the classification of a minister. The statements I made in U. S. Exh. 6 are true. In November, 1942, I appeared before Local Board 89 again with regard to the 1-AO classification I had received and submitted to it Defendant's Exhs. B and C., affidavits of H. Brand, Henry F. Papenhausen, Alice L. Papenhausen, Arie Rader and Dr. Claude W. Emmons, which the defendant had prepared and had signed by said affiants and sworn to. I have always advocated strict obedience to the Constitution and the Bill of Rights and that a citizen of the United States, particularly those associated with Mankind United, should never violate any law of the United States. On November 20, 1942, I had a hearing before the Board at which I was asked why I couldn't accept the classification of 1-AO and I said I couldn't accept it due to the fact that such would require me to do work of a

(Testimony of Claibourne R. Tatum.)

war nature because I would then be relieving others to do work that I would not be willing to do. I went there for the classification of 4-D. I never received any notice that I had been given a 1-A classification but I did receive notice of a 1-AO classification. Until four days ago I did not know that the classification had been changed from a 1-A to a 1-AO one. I was not willing to accept the 1-AO classification, but to accept a 4-D [27] classification. I wrote a letter to the Local Board and Mr. Wells had me come in to the Board and sign an appeal.

The following then occurred. Counsel for defendant read in part from U. S. Exhibit No. 9, and the defendant explained his answers.

In my letter to the Board (U. S. Exh. 9) I stated, "I willingly acknowledge that I am not ordained by the authority of men, in accordance with the tenets of their sects, but I hold to the fact that I am ordained by the will of God," by which I meant this, that aside from ministerial classification, as some persons think they fall into by ordainment of men, that there is another, just as authentic an ordination through inspiration and through an enfoldment and enlightenment which develops from within and which is, I believe, that God which is within us, developing to a point, of being articulate through the human individual, and in that respect I became a minister under that classification without ordainment. I claim that I am and have been a minister by virtue of preaching the Gospel. As

(Testimony of Claibourne R. Tatum.)

a minister, a Christian and a conscientious objector entertaining my views as such ever since 1937 I cannot condone war or participate in it in any way. In U. S. Exh. 9 I stated, "Again, I cannot participate in war, but I can help to further the present American effort to make future wars impossible." What I have done and do to make this statement true is to endeavor to develop in the public mind an awareness of Christian principles and the fact that through their practical application the need for war is no more, that people need not strive to settle their difficulties through war but can through reason and proper cooperation. In that Exhibit I also stated, "Please reconsider your recent decision and reclassify me to 4-D where I rightfully shall be left free to be of Christian service to America and mankind." By that statement I have and do consider the performance of the duties of an unordained minister through the organization of Mankind United to be a Christian Service to America and mankind.

The purposes of Mankind United are to end illiteracy, poverty and war without having to resort to physical violence or bodily [28] suffering, mental suffering or any harm. I have accepted and believed in those principles ever since 1936. It advocates that people, regardless of race, color, religion or belief, join together, regardless of sect, denomination and heredity, for the purpose of applying Christian principles without discrimination in a state of cooperation, to the end that all men

(Testimony of Claibourne R. Tatum.)

shall live free and equal. I have preached these principles since 1937 to over 300 audiences. I consider Mankind United to be a religious organization but not in the sectarian or churchianity sense. In a sectarian sense it might be considered non-religious in character because it does not require any person associating with it to give up his religious beliefs or church affiliation.

I first saw the Hearing Officer's Report, Defendant's Exh. A at Local Board 89 but was allowed to peruse only pages 14 to 16 thereof until Mr. Karesh permitted me to read the whole thereof. I told the Hearing Officer in the course of the hearing held by him that I did not know the address of the Timely Books Library for which I had been working since November, 1941, and I do not now know its address. In his report the Hearing Officer states that my wife and I were well dressed and that he did not believe I was earning only $50 per month. However, the fact is that we received approximately $50 per month for the total upkeep of the house in which we lived and that we lived on a very frugal basis. At that hearing I wore a pair of slacks that my sister and my wife purchased for me for Christmas the year before and the coat I wore on that occasion and which I wore to court today and which is hanging on the rack was purchased before the war and my hat is over three years old, my shoes are over a year old and a coat to a suit which is easily three years old. I am better dressed now than then.

(Testimony of Claibourne R. Tatum.)

My wife is now wearing the coat she wore at that hearing which was purchased with money received by her from pawning my mother's engagement ring. A reason given in the Hearing Officer's report for [29] denying my claim as a conscientious objector was that some persons who were associated with Mankind United had been indicted. I have never been indicted or prosecuted on any criminal charge except in this case and know nothing about any indictment of any persons associated with Mankind United except what I have read in newspapers. In U. S. Exh. 13 in which I stated, "I am convinced that prejudice rather than fair and impartial judgment has caused my character and in turn my case to be seen in an improper and unjust light," I was referring to the Hearing Officer because his report concluded that my claim of a conscientious objector should be denied because some other persons were prosecuted criminally and because he concluded from a twenty minute interview with me that I was not telling the truth on matters. In the course of that hearing the Hearing Officer never indicated that he had any source of information that I was receiving more than $50 per month or that he did not believe I was working for the Timely Books Library or that he believed I knew its address.

(Thereupon a letter dated June 26, 1943, a letter written by the defendant to Col. Leitch, the State Director of the Selective Service System, was introduced into evidence as Defendant's Exh. H and a letter dated July 1, 1943, from Col. Leitch to

(Testimony of Claibourne R. Tatum.)
defendant was introduced into evidence as Defendant's Ex. I. Thereafter a letter dated July 2, 1943, addressed to Col. Leitch to the defendant was introduced into evidence as Defendant's Exh. J, and thereafter a letter dated July 16, 1943, addressed to the defendant by Col. Leitch was admitted into evidence as Defendant's Exh. K.).

I cannot participate in war because of the fact that the very laws of Christianity forbid it.

Cross Examination

I have followed the teaching of Jesus, "Render unto Caesar that which is Caesar's, and unto God that which is God's" insofar as it is possible, to the best of my ability to interpret that. I [30] interpret that as a student of the Bible. I understand that the teaching means to follow the law of the state or nation insofar as it is compatible with Christian principle. I think that by going into the armed forces or to a consicentious objector's camp would be a compromise of my conscience and my service to my fellow man and my Christian convictions. I believe that those who go into the Army are doing something incompatible with Christian principles but I do not condemn them for it. I would be a traitor to God if I went into the armed forces. My training in the R.O.T.C. was voluntary. I was not a conscientious objector at that time because I then had no definite opinions. On December 9, 1942, I appeared before the Appeal Agent of Local Board 89 and stated to him that I wished to be classified 4-D. He said "I doubt very much if

(Testimony of Claibourne R. Tatum.)

you will ever get a 4-D classification, in my opinion." He suggested that the accepted thing to do was to offer alternatives in doubtful cases and thereupon prepared a letter, dated December 9, 1942, addressed to Board of Appeals No. 7, requesting a 3-A deferment which I signed. This letter was thereupon admitted into evidence as U. S. Exh. 15 and was read to the jury. I believe the Hearing Officer, Hugh McKevitt, was prejudiced. I believe Local Board 89 was prejudiced but I do not believe there is any malice there. By prejudice I do not mean that anyone was prejudiced against me but that their understanding of the application of my principles may vary. I could not accept a 1-AO classification because those so classified and called are under military direction and whatever is under military direction is war effort. I could not go to a conscientious objector's camp because in those camps a minister has no opportunity to function in a ministerial capacity. I filled out the C. O. form because I believe all Christian ministers should fill out that form, all persons opposed to war should fill out that form. The law is, "Thou shalt not kill." According to my doctrine the taking of life is murder. I have the greatest respect for the fact [31] that those in the Army are making a sacrifice in their own conscience, believing they are doing the right thing, and are above reproach because they believe they are doing the right thing. But from the standpoint of universal law they are committing

(Testimony of Claibourne R. Tatum.)

murder. It is not my opinion; it is already stated in the Bible.

I preached the doctrines of Mankind United prior to Pearl Harbor but not publicly since then. I am preparing written sermons for release at a yet unfixed future date when circumstances for their release has been established. I believe I am a regular minister of religion by virtue of the study I have made of Christianity as applied to one's everyday life. I have endeavored to understand the Christ's statement as it appears in the Bible, and as it relates to Mankind United and finding no inconsistencies I believe it was pertinent to teach those principles and their application for the purpose of establishing the principles of Christ in a practical manner and in that sense I do not believe any Christian minister can do more, whether ordained or otherwise. By virtue of this practice and preaching of these principles I believe I am entitled to exemption under the Selective Service Act. I do not know who is the head of the Timely Books Library because it is associated with Mankind United and I do not know the head of Mankind United. An agent of the Timely Books Library whom I know as Mr. Speaker and whose photograph appeared in a newspaper as Mr. Bell pays me the $50 per month in cash. I do not know that he is the head of the Timely Books Library—he has never acknowledged himself as such to me. I have never asked him who is the head. That is a personality.

(Testimony of Claibourne R. Tatum.)
I do not serve personalities. I serve principles and God, which we all believe in. My wife and I live on $50 per month. My wife assists me in my work, doing my typing for me.

(Thereupon Mr. Karesh offered to re-read to the jury the findings of fact and conclusions of the Hearing Officer, Hugh McKevitt, contained in Defendant's Exh.A to which the defendant objected on [32] the ground the defendant ought to be entitled to answer questions thereon as the reading progressed and to show him the document and let him give his reasons where the statements made therein were untrue. The objection being overruled, the defendant excepted thereto and the Court allowed the exception.)

The Defendant's Exh.A was thereupon handed to the witness and the following questions were propounded to the witness by Mr. Karesh and the following answers were made by him:

"Q. I ask you, do you think the Hearing Officer who rendered that report was prejudiced?

A. I believe there is a prejudice in stating, "Notwithstanding the Federal Bureau of Investigation," and wiping that entire report aside as a personal responsibility and a prejudicial act on his part—in disregarding that entire testimony, and also his opinion I am not telling the truth because I, myself, know that I was and am; also in stating that I refused or indicated that I would not reveal the address of the Timely Books Library—he errs

(Testimony of Claibourne R. Tatum.)

there, because I was merely asked, "Did I know the address?" I replied, "No." I was not questioned whether I was hiding anything and, as I stated before this Court freely—and I hope it is believed, because, after all, it is so—I do not know where that place is located. It has not been considered that I should. There is a one-way contact between that bureau and me, or that Timely Books Library and me. I do not know how to contact it.

As far as my receiving $50 a month, that is actually the case, and to infer that is not the case and I am lying about my income because of my dress, however it may be, my clothing, my wife's clothing, is purely presumptuous. He has no knowledge where I bought them, how I paid for them, or the circumstances. He merely states I was wearing clothes, therefore I couldn't possibly have been receiving $50 a month.

And also he contends I am not telling the truth because I say I am writing sermons which I cannot by the wildest stretch of my imagination see how he can possibly arrive at because I state I am writing sermons, which I am. He asked for no proof. He merely asked, "What are you doing? Writing sermons for yourself?"

"No, for Timely Books Library." And that was the end of it.

"Registrant says he is a minister," and so on and so forth. He says, "Under no stretch of the imagination could he be considered a minister." I do not think he was asked to stretch his imagination, but only to look at the facts.

(Testimony of Claibourne R. Tatum.)

His mentioning of Mankind United and the reference to the indictment, and so on and so forth—he is accurate there—but I believe that the particular reference was definitely—the inclusion of that statement was for the purpose of inferring something that could have a very disagreeable flavor in regard to this particular document and influence those perusing it and reading the decision prejudicially.

Also, the mention of an alias of Mr. Browne used by Mr. Bell. [33] I, myself, have used, shall we say, a pseudonym—not an alias—I rather think of the term as pseudonym—for the purpose of certain financial dealings in purchasing supplies which I use at the present time, owing to the fact that I do not wish to have any contact with the field nor to have my former friends interrupt my studies, and therefore to deal through my name, generally I have used a pseudonym, myself, freely, but not with the intention to deceive.

And the name "Timely Books Library"—I do books for the Timely Books Library, but I do not know the Timely Books Library.

He says the scheme of Mankind United is not religious in substance or nature, and he draws upon his own opinion for that. There is no proof that it is not a religious organization. Its principles have never been proved wrong in court.

And in toto I believe the Hearing Officer errs and assumes things to be so which are not so, and in that circumstance he is prejudiced—would have to be

(Testimony of Claibourne R. Tatum.)

prejudiced in order to reach those conclusions without basis in fact."

I wrote a letter to General Hershey, the National Director of the Selective Service System. He did not reply thereto but I believe he referred to letter to Colonel Leitch's office. I have never had a stay of induction from General Hershey or from Colonel Leitch. I am not willing to go into the Army for general military service or for non-combatant service or to go to a conscientious objector's camp. I received a notice to report for induction on July 26, 1943, but did not report. I received a notice that my Board of Appeal has classified me 1-A the day preceding the day I received the notice to report for induction. I received a notice of delinquency, Form 281. I answered that notice and said I would be unwilling to go into the service. I exhausted every administrative procedure in an effort to bring about a review of my file.

Redirect Examination

Mr. Orville C. Pratt, the Appeal Agent of Local Board 89 typed U. S. Exh. 15. I was sent to see him by Mr. Wells, the clerk of the Local Board, Mr. Pratt is a lawyer as well as the Appeal Agent. The word and figure "or 4-E" written on that exhibit were written by Mr. Pratt in his own handwriting. The letter dated December 13, 1942, annexed to that exhibit was typewritten by Mr. Pratt and I signed it at his instance and request. On June 8, [34] 1942, in U. S. Exhibit 5 I stated, "I am not averse to helping to save a life, but I would rather have my own

(Testimony of Claibourne R. Tatum.)

life taken than to take the life of another or help someone else do the same." I still have the same view that I then stated.

Recross Examination

If I served as a 1-AO I would be helping someone else to take a life. If I went to a conscientious objector's camp I would be removing myself from a field in which I could be of greater service, and I would be ignoring the responsibility I feel imposed on me, on my conscience.

Further Redirect Examination

If there is a choice between my taking someone else's life or losing my own I would rather have my own taken.

Further Recross Examination

If I saw someone taking the life of my fellow countryman—if I saw a Jap taking the life of my fellow countryman I would like to be able to look at the whole matter dispassionately and in a Christian manner and try to circumvent the action without using physical force. The ways and means might present themselves at that time. If such a circumstance occurred, if it came to the question of taking the Japanese person's life or my own I would far rather that he would take mine, because, after all, I do not know what I would be doing to him, and perhaps I am better prepared to sustain the experience.

TESTIMONY OF BETTY DODGE

Betty Dodge, called as a witness for the defendant, being first sworn, testified as follows:

I reside in San Francisco. My husband is a member of the armed forces of the United States. The defendant is my half brother. I have discussed his views with regard to war with him very often during the past three years prior to our entry into the war. I loaned him the money with which he bought the suit he is [35] wearing in court today. He has always been violently opposed to war. His opposition to war has been based upon both political and religious views, but primarily upon religious ones. When I was interviewed by an agent of the Federal Bureau of Investigation I told the agent the defendant had always been violently objecting to war and that he had been so far back as I can remember.

Cross-Examination

The defendant told me that he considers himself a minister. The following questions were then put to the witness by Mr. Karesh and the following answers given by her:

Q. Do you consider him a minister?

A. Well, I know my brother's views on the subject, but I don't know too much about his private home life.

Q. You say that he has always been violently opposed to war? A. He has.

Q. And you are married to an Army officer, is that right? A. An Army private.

(Testimony of Betty Dodge.)

Q. As a matter of fact, all people in America are violently opposed to war?

A. I believe that all people would, if they were strong enough, be opposed to war.

Q. And that includes the men in the armed forces?

A. They are there under circumstances I do not think they can help.

TESTIMONY OF FREDERICK W. ROSHER

Frederick W. Rosher, called as a witness for the defendant, being first sworn, testified as follows:

I first met the defendant about 1932 and have known him intimately since 1936. I invited the defendant to appear as a lecturer on Mankind United in 1937. I have heard him lecture in Salinas, Modesto, San Francisco, Oakland and other places. The nature of those lectures or sermons which he delivered was that stated by him in court at this trial, applying Christian principle [36] to the needs of the world as to daily living.

(The plaintiff did not cross-examine the witness.)

TESTIMONY OF MRS MARIAN L. ROSHER

Mrs. Marian L. Rosher, called as a witness for the defendant, being first sworn, testified as follows:

I have known the defendant since the fall of 1941.

(Testimony of Mrs. Marian L. Rosher.)

The nature of his work during the time I have known him has been as he has testified at this trial —proofreading and the writing of sermons. I have never heard him lecture from the public platform.

(The plaintiff did not cross-examine the witness.)

TESTIMONY OF H. BRAND

H. Brand, called as a witness for the defendant, being first sworn, testified as follows:

I know the defendant. I have heard him deliver sermons in San Francisco, Palo Alto, Redwood City and other places. The first time I heard him deliver a sermon was in 1938 in the Palo Alto Public Library. I heard him deliver sermons in the Women's Club in Redwood City and in the Western Women's Club in 1938, 1939 and 1940. He discussed the Bible.

(The plaintiff did not cross-examine the witness.)

TESTIMONY OF HENRY F. PAPENHAUSE

Henry F. Papenhause, called as a witness for the defendant, being first sworn, testified as follows:

I am a general contractor and in the hardware business. I know the defendant. I have heard him deliver sermons to groups of people about a dozen times between 1937 and 1940 in which he discussed the Bible, the concepts of the Bible, and the way of

(Testimony of Henry F. Papenhause.)

living with regard to those concepts. I was invited to attend those sermons by Mr. Brand. That is how I became acquainted with the defendant. [37]

Cross-Examination

I am not a member of Mankind United but I am affiliated with them. I get literature to read. I attend some of the meetings and we study a good deal on the Bible. I contribute money to it once in a while. I have not heard the defendant speaking since 1939 when the meetings were discontinued.

TESTIMONY OF ARNOLD E. MILLER

Arnold E. Miller, called as a witness for the defendant, being first sworn, testified as follows:

I am a half brother to the defendant. I am a newspaper man by profession but presently am assistant to the Director of Public Information at the Pacific Area Red Cross Office. I was rejected by the Army and Navy because of a physical disability. I lived with the defendant until 1936 when our mother passed away and our home broke up. Thereafter I went to Europe and saw him again in 1937 and 1940. He and I carried on correspondence in which he expressed the views he expressed on the witness stand at this trial.

(The plaintiff did not cross-examine the witness.)

TESTIMONY OF ALICE TATUM

Alice Tatum, called as a witness for the defendant, being first sworn, testified as follows:

The defendant is my husband. I have known him since 1934. I met him while both of us were singing in the choir at a Methodist Church in San Francisco. We were married in 1936. We entered into the group known as Mankind United together. I have heard him deliver sermons or lectures at various meetings to people who entertain thoughts of Mankind United. Those sermons were based upon the Bible and on the ideals and principles of Mankind United. I have frequently discussed with him his attitude toward war and he was always of the same frame of mind thereon as he announced from the witness stand today at this trial. I have been assisting him in the [38] preparation of his sermons by typing them for him. During the past two years and ever since he has been working on these sermons our income has been $50 per month. The coat I am wearing was purchased with funds obtained from the Remedial Loan by sale of a diamond ring. My husband has devoted his entire time to this movement ever since he left his occupation as an artist to enter it.

(The plaintiff did not cross-examine the witness.)

Thereupon the defendant rested.

Thereupon counsel for the respective parties made their arguments to the jury. The following exceptions were noted by counsel for the defendant to the argument of Mr. Karesh to the jury, to-wit:

"Mr. Karesh: * * * * I call your attention to the blood of the battlefield—

Mr. Wirin: We object to the blood of the battlefield and charge it as a prejudicial statement of counsel. We ask that the Court instruct counsel not to refer to the blood of the battlefield in his argument.

Mr. Karesh: I see nothing prejudicial about it, and I say to your Honor—with all respect this is—it is the Selective Service System, and under the Selective Service Act if a man is called and refuses to respond, someone else must be called.

The Court: Proceed.

Mr. Wirin: May we have an exception?

The Court: Note an exception.

* * * * * *

Mr. Karesh: And by inference he casts on those who are now fighting in the armed forces of our country the stigma of traitor to God, on those men who were willing——

Mr. Wirin: I want to address this Court. I object to that remark of counsel on the ground it is highly prejudicial to the defendant, and we ask the Court to instruct counsel not to make that argument, on the ground it is improper, an unwarranted inference from any of the evidence in this case, and a consciously improper effort by the prosecutor to appeal to the prejudice of the jury.

Mr. Karesh: I can say, your Honor, if anyone attempted to appeal to the patience and prejudice of anyone, it was you, yourself, counsel.

Mr. Wirin: Your Honor, we assign that as additional misconduct [39] on the part of the prosecutor and request the Court to instruct the jury to disregard the statement of Mr. Karesh.

Mr. Karesh: Rather than to quibble, your Honor, on such an issue, I will withdraw my argument on that point.

Mr. Wirin: No, we state to the Court the statement made by counsel—

The Court: What statement?

Mr. Wirin: The statement made about me is highly improper and an appeal to the prejudice of the jury.

The Court: Let the statements of both counsel go out and the jury will disregard them for all purposes in this case.

Mr. Wirin: May we have an exception, your Honor?

The Court: Proceed.

Mr. Karesh: I might say, the testimony of the defendant, "traitor to God," stands for itself.

* * * * * *

* * * * * *

Mr. Wirin: * * * He did not know he was entitled to a classification as a minister.

Mr. Karesh: I ask that that go out. You said he did not know he was the type of person who was entitled to the classification of minister. We contend he is not.

Mr. Wirin: All right. He did not know at that time that he was the kind of person who could make a claim that he was an unordained minister, because he did not know the law provided for that.

* * * * * *

Mr. Wirin: * * * * The members of the F.B.I. in that report said he was sincere——

Mr. Karesh: Just a moment—I wouldn't have objected unless you had, but there are people in that report of the F.B.I. who did not say he was sincere.

Mr. Wirin: If there are, there are one or two, and I am sure you will bring it up. You are very sure to get a conviction in this case.

Mr. Karesh: I do not think that is fair.

Mr. Wirin: You are not?

Mr. Karesh: I am concerned with doing the duty of the oath I took.

Mr. Wirin: We will find that out in Mr. Karesh's concluding remarks." [40]

After the oral arguments had been presented to the jury by counsel for the respective parties the Court instructed the jury, giving to the jury all of the written instructions proposed by the plaintiff and none of those proposed by the defendant. Prior to the time the jury withdrew to deliberate on its verdict the defendant duly excepted to the Court's refusal to give defendant's complete proposed Instructions Nos. 1 to 15 inclusive to the jury and excepted to the giving to the jury of plaintiff's proposed Instructions Nos. 4 to 7 inclusive, and said exceptions were duly allowed and noted by the

Court. These exceptions were taken and noted in the following language:

"Mr. Wirin: May I address the Court before the jury retires?

The Court: Yes.

Mr. Wirin: We except to the instructions proposed by the Government and given by the Court, numbered 4 through 7, inclusive, in the document entitled "Plaintiff's Proposed Instructions."

We except to the failure and refusal of the Court to give the defendant's proposed instructions numbered 1 to 17, inclusive, and we except additional to the instructions given by the Court which I think for convenience and brevity I might define as the instructions of the Court on the question of intent.

The Court: Let the record so show. The jury may retire.

Thereupon on November 17, 1943, at 9:45 a.m. the jury retired, and returned into Court at 10:06 a.m. with a verdict of guilty.)"

The following are the complete number of instructions requested by the defendant which were refused by the Court and to which refusal exceptions were taken by defendant and noted by the Court, to-wit:

"No. 1. You are instructed that the Selective Training and Service Act of 1940, as amended (5(g)) provides for exemption from military service those who by reason of religious training and belief conscientiously are opposed to participation in war in any form, if their claims are sustained.

Any person who is found by the Selective Service agencies to be conscientiously opposed to participation in war in any [41] form is to be assigned to work of a national importance under civilian direction, in lieu of induction into the armed forces.

You are further instructed that there has been set up numerous civilian public service camps througout the country, to which camps such conscientious objectors are assigned to perform work of national importance.

You are further instructed that Selective Service Regulations, paragraph 622.51 provides that registrants who are found by the Selective Service agencies, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combat and non-combatant military service are to be classified as IV-E.

You are further instructed that in the event that a local draft board refuses to grant a IV-E classification to a registrant, the registrant has a right of appeal. That in the event the registrant takes such appeal, the Selective Service Regulations further provide (627.25) that the department of justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant; and that the registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard.

You are further instructed that an opportunity to be heard includes an opportunity furnished to the

registrant to know the nature and import of any evidence in the possession of the hearing officer adverse to the registrant, so that the registrant may be afforded the right and opportunity to meet or otherwise refute such adverse evidence.

You are further instructed that a finding by a hearing officer, or a recommendation by a hearing officer based upon evidence or information not made known to the registrant and without afford- [42] ing the registrant an opportunity to meet or refute such evidence, is not in accord with due process of law, and makes such finding or recommendation arbitrary and capricious; and a hearing resulting in such findings or recommendation is not a fair hearing as required by due process of law.

No. 2. That defendant is charged with having "knowingly and feloniously" failed and neglected to comply with an order of his local draft board, No. 89, to report for induction into the Land and Naval forces of the United States, as provided in the Selective Training and Service Act of 1940, as amended, and the rules and regulations made pursuant thereto. The burden is upon the Government to prove that the defendant failed to report as ordered in each of these particulars.

The word "feloniously" means done with an evil heart or purpose; with a wicked intent; malicious, villainous or perfidious. It means an act done with intent to commit a crime, with a mind bent on that which is wrong.

If you find that the defendant did not feloniously fail to comply with the order of the board to report

for induction, or if you find that there is a reasonable doubt as to whether the defendant feloniously failed so to report, you will find the defendant not guilty.

No. 3. You are instructed that a registrant is not required to comply with an order of a local board or of any other Selective Service agency if such order is void or unlawful.

You are further instructed that if you find that the defendant has violated no lawful order of his local board or any other Selective Service agency, you are to acquit the defendant.

No. 4. You are instructed that although under the Act, the decision as to what classification a particular registrant is to [43] receive is left to the local board, this does not mean that a court of law does not have the power nor that you as a jury do not have the power to review a classification.

This review is limited, however, to a determination by the jury of the facts, subject to the limitations to be indicated by the court in later instructions, that constitute arbitrariness or capriciousness, denial by the draft board of a fair hearing, or violation by the draft board of the provisions of the Selective Service and Training Act, or the Rules and Regulations adopted pursuant to the Act.

No. 5. You are instructed that Local and Appeal Boards under the Selective Service System must not act in an arbitrary or capricious manner. Classifications by such boards must be based upon the evidence before them and that evidence alone.

If you find that the local and appeal boards in

this case acted in an arbitrary or capricious manner or disregarded the evidence that was before them or failed to give the registrant, defendant herein, a full and fair hearing, you will acquit the defendant and find him not guilty.

No. 6. You are further instructed more particularly that if the order of the local or appeal boards in classifying the defendant or the recommendation of the hearing officer was made arbitrarily or capriciously, or was the result of passion or prejudice; or was made in disregard of the evidence presented to it, or if there was not substantial evidence to sustain the findings of said agencies; or if the defendant was denied any hearing at all; or was denied a full and fair hearing, the order of the local or appeal board in ordering the defendant to report for induction into the armed forces, or the recommendation of the hearing officer resulting in said order, was an illegal order since it was made [44] as a result of the deprivation of the defendant in his rights of due process of law.

It is for the jury to determine the facts as whether any of the above took place in the case of the defendant.

No. 7. You are instructed that under the Rules and Regulations of the Selective Service system a registrant who objects to a classification given him by a local draft board, has the right to request a personal appearance and hearing before said local board; that the registrant at said hearing is entitled to present evidence or information to the board supporting his claim for a classification, and is entitled

to have said evidence heard and considered by said local board.

You are further instructed that if a local board refuses to permit a registrant to produce such evidence, or if a local board refuses to consider said evidence, that said hearing violates due process of law; is arbitrary and capricious and an order resulting from such a hearing is void.

No. 8. The denial of a full and fair hearing is the same thing as the denial of any hearing. Therefore, if you find that although the defendant was granted a hearing either by the local board or the hearing officer, if either of those hearings was not a full and fair one, but was merely perfunctory and was not in accord with the ordinary rules of decency and fair play, or not in accord with the Selective Service System Rules and Regulations, you will find the defendant not guilty.

No. 9. If you find that there was not substantial evidence before the local and appeal boards to sustain the finding that defendant should be classified as he was, you will find the defendant not guilty.

By substantial evidence is meant a large quantum of evidence. It does not mean an absence of evidence and it means more than just [45] a scintilla or some evidence. It means that there must be enough evidence before the boards so that a reasonable man in the same circumstances as presented in this case would come to the same conclusion as the boards did.

If there was not enough of such evidence before

the local or appeal board, you must acquit the defendant.

No. 10. If you find that the decision of the local or appeal board was arrived at because of passion or prejudice against the defendant or against Mankind United, you will find the defendant not guilty.

No. 11. If you find that the local board acted arbitrarily or capriciously in classifying the defendant as it did, you will find the defendant not guilty.

No. 12. If you find that the local or appeal board, or the hearing officer, disregarded the evidence presented on behalf of the defendant, you will find the defendant not guilty.

No. 13. You are instructed that under the Selective Training and Service Act it is not necessary for a person to be a member of or belong to a church or religious organization in order to be entitled to classification as a conscientious objector. Under the present law, conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed.

Religious belief may be defined as a "sense of inadequacy of reason as a means of relating the individual to his fellow men and to his universe"; it finds "expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tents."

No. 14. Arbitrary power and the rule of the United States Constitution requiring the principle of fair play (legally known as "due process") cannot both exist at the same time. They are anta- [46]

gonist and incompatible forces. Of necessity arbitrary power must perish before the rule of the Constitution. There is no place in our constitutional system of government (and this includes the administration of the Selective Service System) for the exercise of arbitrary power.

No. 15. You are instructed to find the defendant not guilty."

The following are the complete number of instructions requested by the plaintiff which were given by the Court to the jury to the giving of Nos. 4, 5, 6 and 7 of which the defendant took exceptions which were noted by the Court, said instructions being prefaced by the preliminary remark made by the court to the jury, to-wit:

"The Court (orally): It now becomes the duty of the Court to instruct the jury on the law of this case. It is the duty of the jury to apply the law that is given them to the facts before them.

It is the duty of the jury to give uniform consideration to all of the instructions which will be given, to consider all parts together, and to accept such instructions as a correct statement of the law involved."

"No. 1. The indictment in this case charged that Claibourne Randolph Tatum, being a male citizen between the ages of twenty-one and thirty-six years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of the Act of Congress approved September 16, 1940, known as the "Selective

Training and Service Act of 1940" and thereafter to comply with the rules and regulations of said Act, and having in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 89 of the Selective Service System in the City of San Francisco, State of [47] California, which said Local Board No. 89 was duly appointed and acting for the area of which the said defendant is a registrant, did, on or about the 26th day of July, 1943, in the City and County of San Francisco, in the Southern Division of the Northern District of California and within the jurisdiction of this Court, knowingly and feloniously fail and neglect to perform such duty, in that he, the said defendant, having theretofore been classified in Class 1-A, did then and there knowingly and feloniously fail and neglect to comply with the order of his said Local Board No. 89 to report for induction into the land or naval forces of the United States, as provided in the said Selective Training and Service Act of 1940 and the rules and regulations made pursuant thereto.

No. 2. The pertinent portion of Section 11 of the Selective Training and Service Act of 1940, under which the defendant in this case is charged in the indictment, states that any person

> "***who in any manner shall knowingly fail or neglect to perform any duty required of him under *** this Act or rules and regulations made pursuant to this Act *** shall upon conviction be punished,"

as in said Act provided.

No. 3. I instruct you that in Class I-A shall be placed every registrant who is found available for general military service, and such registrant shall be liable for induction into the Armed Forces of the United States.

No. 4. I instruct you that the local boards under rules and regulations prescribed by the President shall have power within their respective jurisdiction to hear and determine, subject to right of appeal to appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under the Selective Training and Service Act of 1940 of all individuals within the jurisdiction of such local [48] board. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.

No. 5. I instruct you that each Board of Appeal shall have jurisdiction to review any decision concerning classification of a registrant by any Local Board in the area of the Board of Appeal, provided that an appeal has been filed with the Local Board. Such appeal must be taken within ten days after the date when the Local Board mails to the registrant a Notice of Classification (Form 57). The decision of the Board of Appeal shall be final unless modified or reversed by the President.

No. 6. I instruct you that whether a Selective Service registrant is a minister of religion or a conscientious objector presents a question of fact which from its very nature is committed by the Act to

the determination of the competent local draft board, and if an appeal is taken, to the determination of the proper Appeal Board. You, as jurors, are not to decide whether the defendant is, or is not, a minister of religion or a conscientious objector. What you are to determine is whether the defendant, after classification, intentionally ignored the Draft Board's order to report for induction.

No. 7. I instruct you that if you find beyond a reasonable doubt and to a moral certainty that the defendant had been classified in Class I-A and that he was duly ordered by his Selective Service Local Board No. 89, San Francisco, California, the Selective Service Board with which he was registered, to report for induction into the land or naval forces of the United States at San Francisco, California, on or about the 26th day of July, 1943, as provided in the said Selective Training and Service Act of 1940, and that at the time and place as aforesaid he knowingly failed and [49] neglected to perform such duty, then you shall find the defendant guilty as charged."

The following instructions were also given to the jury by the Court at its own instance in addition to those requested by the plaintiff, to-wit:

"(a) By the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until the evidence intro-

duced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction.

(b) Every person charged with crime is presumed to be innocent, and this presumption has the effect of evidence, and continues to operate on his behalf until it is overcome by competent evidence. It is not necessary for the defendant to prove his innocence; the burden rests upon the prosecution to establish every element of the crime charged, to a moral certainty and beyond a reasonable doubt.

(c) In every crime there must exist a union or joint operation of act and intent, and for a conviction, both elements must be proven to a moral certainty and beyond doubt. Such intent is merely the purpose or willingness to commit such act. It does not require a knowledge that such act is a violation of law.

(d) However, a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts.

(e) A reasonable doubt is a doubt resting upon the judgment and reason of him who conscientiously entertains it from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant merely every possible or fanciful conjecture that may be suggested or imagined. A reasonable doubt is that state of the case which, after the en-

tire comparison and consideration of the evidence in the cause, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

(f) A reasonable doubt is not a mere imaginary or possible doubt, but a fair doubt based on reason and common sense, and growing out of the testimony in the case.

(g) The defendant is charged with having knowingly and feloniously failed and neglected to comply with an order of his local draft board No. 89, to report for induction into the land or naval forces of the United States, as provided in the Selective Training and Service Act of 1940, as amended, and the rules and regulations made pursuant thereto. The burden is upon the government to prove that the defendant failed to report as ordered in each of these particulars.

(h) The word "feloniously" means with a deliberate intent to do a wrongful act. [50]

(i) The jury are the sole and exclusive judges of the effect and value of evidence addressed to them, and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence should be taken into consideration, for the purpose of determining their credibility and the facts as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak

the truth. This presumption, however, may be repelled by the manner in which he testified; his interest in the case, if any; or a motive for testifying falsely, if any; or his bias or prejudice, if any, against one or more of the parties; by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity; or by contradictory evidence.

(j) The jury are the sole judges of the credibility and of the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable jurors. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the Government, or the defendant, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a

witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony, or any part of it.

(k) A witness may be impeached by the party against whom he was called by contradictory evidence, by evidence that he has made at other times statements inconsistent with his present testimony. If you find that any witness has been impeached, or that the presumption of truthfulness attached to the testimony of such witness has been repelled, then you will give the testimony of such witness such credibility, if any, as you may consider it entitled to. Where a showing of inconsistent statements by way of impeachment is allowed and made, you, as jurors, nevertheless remain the exclusive judges of the credibility of all the witnesses, and are just as much entitled to believe the witness whose statements are impeached as the witness who is not impeached.

(l) There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been presented, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that a defendant is entitled to any reasonable doubt that may remain in your minds,

remember as well that if no such doubt remains the Government [51] is entitled to a verdict.

(m) The Court cautions you to distinguish carefully between the facts testified to by the witness and the statements made by the attorneys in their arguments, or presentations as to what facts have been or are to be proved. And if there is a variance between the two, you must, in arriving at your verdict, to the extent that there is such a variance, consider only the facts testified to by the witnesses; and you are to remember that statements of counsel in their arguments or presentations are not evidence in the case.

(n) If counsel upon either side have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are.

(o) If counsel, however, have stipulated or agreed to certain facts, you are to regard the facts stipulated to as being conclusively proven.

(p) The Court charges the jury that if you find and believe from the evidence that the defendant, Claibourne Randolph Tatum, on or about the 16th day of October, 1940, was duly registered with Selective Service Local Board No. 89, of the City and County of San Francisco, California, and that he thereafter duly filed his questionnaire and that he was thereafter classified by the said Board, and that he was thereafter allowed to appeal to the Board of Appeal, and further find that the Board of Appeal classified the defendant in Class 1-A, and if you further find that he was then notified of this classi-

fication by the said local board, and that thereafter he was duly notified by said Local Board No. 89 to report for induction into the land or naval forces of the United States on or about the 26th day of July, 1943, and further find that the defendant thereafter knowingly, willfully, unlawfully and feloniously failed and refused to report for induction in obedience to said order of said local board, then you are instructed you must find the defendant guilty as charged in the charge set out in the indictment, and if you do not so find, then you should acquit the defendant.

(q) Although as men and women you may sympathize with those who suffer, yet as honest men and women, bound by your oath to administer judgment according to law and evidence, you should not act upon your sympathies without any proof; mercy does not belong to you. No question of mercy, sentiment, or anything else resides with you, except the question of whether or not you believe from the evidence, and beyond a reasonable doubt, that the defendant is guilty. If, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should return your verdict accordingly. Duty demands it, and the law requires it. You must be just to the defendant and equally just to the Government. As manly, upright men and women, charged under your oaths with responsibility and duty of assisting the Court in the administration of justice, you will put aside all

sympathy and sentiment, all consideration of public approval or disapproval, and look steadfastly and alone to the law and the evidence in the case, and return into Court such a verdict as is warranted thereby.

(r) In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded. [52]

(s) The verdict of the jury should represent the opinion of each individual juror; it by no means follows that the opinions may not be changed in the jury room. The very object of the jury system is to secure unanimity by comparison of views and by arguments among the jurors, themselves.

(t) There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities as human beings, resolve the facts according to deliberate and cautious judgment.

(u) Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult one another in the jury room, and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

(v) Your verdict must be unanimous.

When you retire to the jury room to deliberate, you will select one of your number as foreman, and he will sign your verdict for you when it has been agreed upon, and he will represent you as your spokesman in the further conduct of this case in this Court.

The Clerk has prepared a form of verdict for you, which you will take to the jury room with you. It is made out in blank, and when you have agreed on your verdict you will fill in that blank and you will have your foreman sign that verdict and bring it back into court with you."

At the conclusion of the reading of the instructions to the jury by the Court the jury retired to determine upon a verdict and thereafter on said day returned a verdict of Guilty as charged in the indictment.

Thereafter on said day November 17, 1943 said Court sentenced defendant to three (3) years imprisonment in a federal penitentiary to be designated by the Attorney-General and the defendant was thereupon taken into custody by the U. S. Marshal.

The above Bill of Exceptions contains a recital of all the evidence, oral and documentary, and all of the proceedings relating to the trial, conviction and sentence made in said action.

Dated: December 13, 1943.

A. L. WIRIN
THEODORE TAMBA
W. M. COLLINS
Attorneys for Defendant. [53]

Receipt of a copy of the foregoing Bill of Exceptions proposed by the defendant is hereby admitted this 13th day of December, 1943.

FRANK J. HENNESSY
UNITED STATES ATTORNEY
Per T. S.
Attorneys for Plaintiff.

STIPULATION

It is hereby stipulated between the parties hereto, by their respective counsel, that the above and foregoing Bill of Exceptions was prepared within the time allowed by law, and as extended by court order at the request of defendant, that it represents the bill of exceptions proposed by the defendant, and as amended by the plaintiff, that the same is in proper form and conforms to the truth and that it may be settled, allowed, approved and authenticated by this Court as the true Bill of Exceptions on appeal herein and be made a part of the records in said case.

Dated: January 8th, 1944.

FRANK J. HENNESSY
United States Attorney
JOSEPH KARESH
Assistant United States Attorney
Attorneys for Plaintiff
A. L. WIRIN
THEODORE TAMBA
WAYNE M. COLLINS
Attorneys for Defendant.

ORDER

It is hereby ordered that the above and foregoing engrossed Bill of Exceptions, duly presented to this court and agreed to by the respective parties hereto, and which has been presented to the Court within the time allowed by law and the rules and orders of this Court, be and the same is hereby settled, allowed, signed and authenticated as in proper form and in conformity with the truth [54] and as the true Bill of Exceptions herein, and the same is hereby made a part of the record in this case.

Dated: January 8, 1944.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Lodged Dec. 13, 1943.

[Endorsed]: Filed Jan. 8, 1944. [55]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Appellant in the above-entitled action assigns as error the following:

(1) The giving of instructions by the Court that the decisions of the Local Board are final.

(2) Giving of instructions by the Court that the jury could not determine whether the Local Board or the Appeal Board was right in its determination of the classification of defendant.

(3) The refusal to give instructions 1 to 15 inclusive requested by the defendant.

(4) The giving of instructions 4 to 7 inclusive requested by the prosecution.

(5) The judgment of conviction violates the rights of the defendant to freedom of religion.

(6) Misconduct of counsel for plaintiff prejudicial to [56] defendant.

Dated this 20th day of January, 1944.

A. L. WIRIN
THEODORE TAMBA
WAYNE COLLINS
Attorneys for Appellant.

Receipt of copy of the foregoing is acknowledged this 20th day of January, 1944.

FRANK J. HENNESSY

[Endorsed]: Filed Jan. 20, 1944. [57]

[Title of District Court and Cause.]

INSTRUCTIONS TO CLERK RE PREPARATION OF RECORD.

To The Clerk of the Above Entitled Court:

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, to-wit:

1. The Indictment.
2. Arraignment and plea, minute entry thereon.
3. The verdict, judgment, sentence to two years in jail and commitment.
4. Notice of Appeal.
5. Court order of Oct. 14, 1943, fixing time within which to file, serve and settle Bill of Exceptions, and orders extending time thereon (minute orders).
6. Assignment of Errors.
7. Bill of Exceptions.
8. All exhibits introduced into evidence at trial.
9. Statements of Points upon which defendant intends to rely upon appeal and description of parts of record to be printed.
10. This praecipe.

Dated: January 20, 1944.

A. L. WIRIN
THEODORE TAMBA
WAYNE COLLINS
Attorneys for Defendant
(Appellant).

(Receipt of Service)

[Endorsed]: Filed Jan. 20, 1944. [58]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 58 pages, numbered from 1 to 58, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of The United States of America, vs. Claibourne Randolph Tatum, No. 28085 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $4.55 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 23rd day of February A. D. 1944.

[Seal] C. W. CALBREATH
Clerk
W. E. VAN BUREN
Deputy Clerk [59]

U. S. EXHIBIT No. 1

San Francisco, California.
November 10th, 1943.

I hereby certify that the attached registration card is a true copy of the original Registration Card for Selective Service, of Claibourne Randolph Tatum, Order No. 1165 a registrant of Local Board No. 89, Selective Service, San Francisco County, California.

OLIN WELLS
Clerk of Local Board No. 89

(over)

[Stamped]: Local Board No. 28 91 San Francisco County 075 Nov 10 1943 089 5108 Geary Blvd., San Francisco, 18, California

Serial Nnumber	1. Name (Print)			Order Number
1505	Claibourne (First)	Randolph (Middle)	Tatum (Last)	1165

2. Address (Print)
563 - 29th Ave. San Francisco, S.F. Cal.
(Number and street or R.F.D. number) (Town) (County) (State)

3. Telephone	4. Age in Years	5. Place of Birth	6. Country of Citizenship
None	27	San Francisco	U.S.A.
	Date of Birth	(Town or county)	
(Exchange (No.)	March 15-1913 (Mo.) (Day) (Yr.)	Cal. (State or country)	

7. Name of Person Who Will Always Know Your Address
Mrs. Alice Washburn Tatum
(Mr., Mrs., Miss) (First) (Middle) (Last)

8. Relationship of That Person
Wife

9. Address of That Person
563 - 29th Ave San Francisco S.F. Cal.
(Number and street or R.F.D. route) (Town) (County) (State)

10. Employer's Name
W.P.A. Project

11. Place of Employment or Business
San Francisco, S.F. Cal.
(Number and street or R.F.D. route) (Town) (County) (State)

I affirm That I Have Verified Above Answers and That They Are True,

Signed— CLAIBOURNE R. TATUM
(Registrant's Signature)

Registration Card
D. S. S. Form 1

(over)

REGISTRAR'S REPORT

Description of Registrant

Race	Height	Weight	Complexion
White X	(Approx.)	(Approx.)	Sallow
	5′ 9½	160	Light X
Negro	Eyes	Hair	Ruddy
	Blue	Blonde	Dark
Oriental	Gray X	Red X	Freckled
	Hazel	Brown	Light Brown
Indian	Brown	Black	Dark Brown
	Black	Gray	Black
Filipino		Bald	

Other obvious physical characteristics that will aid in identification.....

I certify that my answers are true; that the person registered has read or has had read to him his own answers; that I have witnessed his signature or mark and that all of his answers of which I have knowledge are true, except as follows:

.....

NORA ELIZABETH NELSON
(Signature of Registrar)

Registrar for 131 28 S.F. Cal
(Precinct) (Ward) (City or county) (State)

Date of registration—October 16, 1940.

[Endorsed]: Filed 1-15-43.

U. S. EXHIBIT No. 2

SELECTIVE SERVICE QUESTIONNAIRE

Order No. 1165 Date of Mailing May 12 '41

(Stamp of Local Board): Selective Service Local Board 89 380 - 18th Avenue San Francisco, Calif.

Name: Claibourne (First) Randolph (Middle) Tataum (Last)

Address: 563 - 29th Ave.
(Number and street or R. F. D. route)

San Francisco, Cal.
(City or town) (County) (State)

Notice to Registrant

You are required by the Selective Training and Service Act of 1940 to fill out this Questionnaire truthfully and to return it to this Local Board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

This Questionnaire must be returned on or before May 17 '41.

MICHAEL COSTELLO
Member of Local Board.

(The above items are to be filled in by the Local Board before Questionnaire is mailed to the registrant.)

Instructions

This Questionnaire is intended to furnish the Local Board with information to enable it to

U. S. Exhibit No. 2—(Continued)

classify you in one of the following Selective Service classes:

Class I includes men who are available for induction into the armed forces of the United States.

Class II includes those whose induction is deferred because of the importance to the Nation of the service they are rendering in their civilian activities.

Class III includes those whose induction is deferred because they have persons dependent upon them for support.

Class IV includes those whose induction is deferred by law and those unfit for military service.

You will receive notice from your Local Board of your classification.

Oaths required in the Questionnaire may be administered by (1) a member or chief clerk of a Local Board or Board of Appeal member or associate member of an Advisory Board for Registrants, or a Government Appeal Agent; (2) any Postmaster, Notary Public, or any Federal, State, county, or municipal officer authorized by law to administer oaths generally or for military purposes. No fee should be charged for this service.

Advisory Boards for Registrants are organized to assist registrants in completing their Questionnaires. No charges will be made for this service. If there is no Advisory Board available, you must nevertheless complete your Questionnaire.

If the registrant is an inmate of an institution and is unable to complete the Questionnaire, the

U. S. Exhibit No. 2—(Continued)

executive head of the institution shall communicate these facts immediately to the Local Board.

---

1. Make no alterations in the printed matter in this Questionnaire.
2. Write the applicable words in the spaces provided in the Questionnaire.
3. If you furnish additional information or affidavits with your Questionnaire, attach the same securely to it.
4. If you are already in the active military or naval service, obtain a certificate to that effect from your commanding officer and attach same to your Questionnaire.
5. After this Questionnaire has been returned, report to your Local Board at once any change of address or any new fact which may affect your classification.

When a notice affecting you is posted at the office of your Local Board, you are bound to perform the duty required even if no notice reaches you by mail.

Any statements in this Questionnaire marked (Confidential) are for information only of the officials duly authorized under the regulations to examine them.

D. S. S. Form 40

U. S. Exhibit No. 2—(Continued)

[Stamped]: Local Board No. 89. 380 18th Ave. May 17 1941 San Francisco, San Francisco Co., California.

(1)

Statements of the Registrant

Series I.—Identification

Instructions.—Every registrant shall fill in all statements in this series.

1. My name is (print)
   Claibourne (First name) Randolph (Middle name) Tatum (Last name)
2. In addition to the name given above, I have also been known by the names or names of.....
   ---
3. My residence is 563 - 29th Avenue (Number and street or R. F. D. route)
   San Francisco (Town—(City, town or village) San Francisco (County) California (State)
4. My telephone number is BAyview 8681 (Town) (Exchange) (Number)
   (If you have no phone, write "None")
5. My Social Security number is 570-12-4834 (If none, white "None")

Series II.—Physical Condition (Confidential)

Instructions.—Every registrant shall fill in all statements in this series.

1. To the best of my knowledge, I have physical (Have, have no)
   or mental defects or diseases. If so, they are very poor teeth, and a faulty intestinal tract, (subject to Auto-intoxication).
   (List defects or diseases here)

U. S. Exhibit No. 2—(Continued)

2. I..... an inmate of an institution. If so,
(Am, am not)
its name is .....
(Name of hospital, prison, or other institution)
and it is located at.....
(Give address)

Series III.—Education

Instructions.—Every registrant shall fill in all statements in this series.

1. I have completed 8 years of elementary school
(Number)
and 4 years of high school.
(Number)
2. I have had the following schooling other than elementary and high school (if none, write "None"):

Name of Vocational School, College, or University	Course of Study	Length of Time Attended
California School of Fine Arts	Fine Arts (in general)	3 yrs.
Art Students League	Life Drawing	5 mos.
Guy Wiggins Art Academy	Landscape Painting	4 " (?)

Series IV.—Occupation or Activity

Instructions.—All registrants shall fill in statement No. 1 in this series. Every registrant who is now working shall fill in all statements in this series except No. 9. Every registrant who is now prevented from working merely because of some seasonal or temporary interruption shall fill in all statements except statements numbered 2 through 8 in this series.

As used in this series, words such as occupation,

U. S. Exhibit No. 2—(Continued)

work, and job apply to services rendered in any endeavor and to training or preparation for any endeavor.

1. I (W.P.A.) working at present.
   (Am, am not)
2. The job I am working at now is (give full title, for example: Construction draftsman, turret-lathe operator, stationary engineer, farm laborer, prosecuting attorney, physics teacher, medical student, policeman, marriage license clerk, etc.): Artist Grade #1.
3. I do the following work in my present job (be specific—give a brief statement of your duties): Designing, layout, and general supervising of the execution of designs.
4. I have done this kind of work for 8 yrs.
   (Length of time)
5. My average weekly earnings in this job are $21.00. (Confidential.)
6. In this job I am
   (Put an X in one box)

   (X) an employee, working for salary, wages, commission, or other compensation.

   ( ) an independent worker, working on my own account, not hired by anyone, and not hiring any help.

   ( ) working for my father or for the head of my family, but receiving no pay.

   ( ) an employer or proprietor hiring..... paid workers. (Number)

   ( ) a student preparing for .....

U. S. Exhibit No. 2—(Continued)

7. My employer is: U. S. Government.
(Name of organization or proprietor, not foreman or supervisor)
950 - Columbus Avenue, San Francisco, Calif.
(Address of place of employment—street or R.F.D. route, city, and State)
whose business is (W.P.A.)
(For example: Farm, airplane engine factory, retail food store, W.P.A.)

8. Other business or work in which I am now engaged is None
(If none, write "none")

(2)

9. If you are not now working because of some seasonal or temporary interruption, attach to this page a statement (a) explaining what the interruption is, when it began, and when you expect to be able to resume your work, and (b) supplying substantially the same information regarding your last job as is required in the above items in this series.

10. I am not licensed in a trade or profession; if
(Am, am not)
so, I am licensed as.....
(For example: Marine pilot, physician, aviator, stationary engineer)

11. I am not at present an apprentice under a writ-
(Am, am not)
ten or oral agreement with my employer.

12. Other facts which I consider necessary to present fairly the occupation which I have described, or my connection with it, as a ground for classification are (if none, write "None"): that I have had considerable experience with oil, water color, tempera, fresco painting—also work in stone, wood and clay.

U. S. Exhibit No. 2—(Continued)

Instructions.—You may attach to this page any statement from your employer which you think the Local Board should consider in determining your classification. Such statement will then become a part of this Questionnaire.

Series V.—Other Occupational Experience

Instructions.—Every registrant shall fill in this statement. Include any formal apprenticeship served.

1. have also worked at the following occupations other than my present job, during the last 5 years: (if none, write "None")

Occupation (Give full title; for example, turret-lathe opr., farmer, etc.)	Kind of Work Done (Be specific—give a brief statement of your duties)	Years Worked From—	To—
Building Construction Laborer	assisting carpenters,— gen'l maintenance	1936	1939

Series VI.—Agricultural Occupations

Instructions.—Every registrant who works on a farm shall fill in this series, in addition to filling out Series IV and V above.

[Followed by printed form not filled in]

Series VII.—Dependency (Confidential except as to names and addresses of claimed dependents.)

Instructions.—Every registrant shall fill in the statements numbered 1, 2, and 3 in this series.

U. S. Exhibit No. 2—(Continued)

1. (a) I am
(Put an "X" in one box)

( ) single.
(X) married.
( ) a widower.
( ) divorced.

(b) If married, I married my present wife at San Francisco, California on May 4, 1936.
(City and State) (Month, day, year)

(c) I do live with her. If not, her address is.....
(Do, do not)

(3)

2. I have no children who are under 18 years of
(Number of children; if none, write "No")
age or are physically or mentally handicapped, and who live with me.

"Dependent," As Used in This Series Defined

The word "dependent," as used in this series, means any person to whose support the registrant contributes more than merely a small part of such person's support (or to whose support the registrant would contribute were he not temporarily prevented from so doing by the registrant's physical or economic situation) who is either (a) the registrant's wife, divorced wife, parent, foster parent, or grand parent, or (b) the registrant's child, unborn child, brother, half-brother, sister, or half-sister, who is under 18 years of age or is physically or mentally handicapped, or (c) a person whose support the registrant has assumed in good

U. S. Exhibit No. 2—(Continued)

faith, who is either under 18 years of age or is physically or mentally handicapped.

Only a person who is a United States citizen or who lives in the United States or its Territories or possessions may be regarded as a dependent.

Based on the information contained in this Questionnaire and on other information which the Local Board may receive, the Local Board will determine whether the "dependent" is an individual who is dependent in fact for support in a reasonable manner in view of such individual's circumstances on income earned by the registrant by his work in a business, occupation, or employment.

Instructions.—Only those registrants who believe that one or more persons are dependent for support on the registrant's earnings from his work are required to fill in the statements numbered 3 through 12 in this series.

3. The following persons live with me in a home maintained by me and are entirely or partly dependent on my earnings from my work in my business, occupation, or employment, and have no other sources of income except as stated below:

Name	Sex	Age at last birthday	Relationship to registrant	Date when support began	Dependent' income, last 12 months other than board and lodging provided by the registrant in his home. Contributed by the registrant	Earned by the dependent	Received from other sources
Mrs. Alice W. Tatum	F	31	Wife	5-4-36	$1020.—		

U. S. Exhibit No. 2—(Continued)

The net cost to me of maintaining my home during the last 12 months, after deducting $..... Contributed by others than myself for support of such dependants was $1020.

4. The following persons do not live with me in a home maintained by me, but are entirely or partly dependent on my earnings from my work in my business, occupation, or employment, and have no other sources of income except as stated below:

   [Followed by a printed form not filled in]

5. The cause of the dependency of any persons over 18 years of age (excluding my wife) listed above is as follows: (Give the name and a full statement of cause for dependency in each case.).....

6. Of my dependents, only the following are receiving a part of their support from persons other than myself. (Give name of dependent, name and address of other person or agency contributing to his support, and amount so contributed in cash or other things of value by such person or agency during the last 12 months).....

(4)

7. Of the amounts contributed by me to dependents listed above, only $.....contributed
   (If none, write none)
   to Mrs. Alice W. Tatum, was in payment for
   (Name of Dependent)
   my own board and/or lodging.

U. S. Exhibit No. 2—(Continued)

8. The income I earned from my work in my business, occupation, or employment during the 12 months was $1020.—
9. My income from all other sources during the past 12 months was $.....
10. The following is a list of all property owned by (or held in trust for) either me or my dependents, the value of such property, and the net income received by either me or my dependents from such property during the past 12 months: (List this information separately as to the registrant and each dependent. Do not include clothing, personal effects, or household furnishings; or cash less than $500. Indicate which of such property is your home.)

[Followed by printed form not filled in]

11. I do rent the house in which I live. If so, the (Do, do not) monthly rent is $42.—, and the name and address of my landlord is Mr. G. A. Borman, 1040 Bayshore Blvd.
12. Other facts which I consider necessary to present fairly my own status and that of my dependents as a basis for my proper classification are: (If none, write "None.") my wife, owing to a back injury and a past incipient arthritic condition, is unable to support herself in the usual fields of endeavor and not having any formal training for business is wholly unprepared for such employment.

Instructions.—With respect to any dependent

U. S. Exhibit No. 2—(Continued)

(other than the registrant's own wife, child, parent, or grandparent) whose support the registrant has assumed, attach to this page a statement explaining why and under what circumstances the registrant assumed such person's support. Such statement will become a part of this Questionnaire.

Supporting Affidavit of Dependents Over 18 Years of Age

Instructions.—If convenient, each dependent over 18 years of age except the registrant's wife shall swear to (or affirm) the following affidavit. The registrant shall furnish the Local Board a separate affidavit from each such dependent who does not sign the affidavit below. Blanks for this purpose will be supplied by the Local Board on request.

[Followed by printed form containing no entries]

Series VIII.—Minister, or Student Preparing for the Ministry

Instructions.—Every registrant who is a minister or a student preparing for the ministry shall fill in the statements in this series that apply to him.

[Followed by printed from not filled in]

(5)

Series IX.—Citizenship

Instructions.—Every registrant shall fill in the statements numbered 1, 2, 3, and 4 in this series.

1. I was born at San Francisco, California, U.S.A.
(Town) (State) (Country)

2. I was born on March 15 1913
(Month) (Day) (Year)

U. S. Exhibit No. 2—(Continued)

3. My race is: (X) White; ( ) Negro; ( ) Oriental; ( ) Indian; ( ) Filipino; Other (specify).....

4. I am a citizen of the United States.
(Am, am not)

Instructions.—Every registrant who is not a citizen of the United States shall fill in the statements numbered 5, 6, 7, 8, and 9.

[Followed by printed from not filled in]

Series X.—Conscientious Objection To War

Instructions.—Only registrants who are conscientiously opposed to combatant or noncombatant military service by reason of their religious training and belief shall fill in this series, and shall obtain from the Local Board a special form on which to give substantiating evidence of conscientious objection. The Local Board will determine whether the registrant shall be classed as a conscientious objector on the basis of the claim made and the information contained in the special form.

[Followed by printed from not filled in]

Series XI.—Court Record (Confidential)

Instructions.—Every registrant shall fill in statement Number 1.

1. I have not been convicted of treason or a felony. (Have, have not)

Instructions.—Every registrant who has ever

U. S. Exhibit No. 2—(Continued)

been convicted of such an offense shall fill in the statements numbered 2, 3, and 4.

[Followed by printed form not filled in]

Series XII.—Military Service (Confidential)

Instructions.—Every registrant who now is or has been a member of the armed forces of the United States shall fill in the statements in this series. (Use a separate line for each term of service.)

My military service has been as follows:

[Followed by printed form not filled in]

(6)

Series XIII.—Students, Present Members of Armed Forces, Certain Officials, Etc.

Instructions.—Every registrant who is a member of one or more of the groups named in this series shall check the appropriate item or items, and shall supply any further information called for under the item or items checked.

[Followed by printed form not filled in]

Registrant's Statement Regarding Classification

Instructions.—It is optional with registrant whether or not he fills in this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, which

U. S. Exhibit No. 2—(Continued)

should be taken fully into consideration regardless of whether or not this statement is filled in.

In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class.....

(See Instructions, Page 1)

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the Local Board in determining his classification.

Registrant's Affidavit

Instructions.—1. Every registrant shall make the registrant's affidavit. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.

State of California,
County of San Francisco—ss.

I, Claibourne Randolph Tatum, do solemnly swear (or affirm) that I am the registrant named and described in the foregoing statements in this Questionnaire, that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information and belief.

Registrant sign here ☞

CLAIBOURNE RANDOLPH TATUM

(Signature or mark of registrant)

U. S. Exhibit No. 2—(Continued)

Subscribed and sworn to before me this 17th day of May, 1941.

[Seal] JOHN MERTINS
(Signature of officer)

.....
(Designation of officer)

Notary Public in and for the City and County of San Francisco, State of California. My Commission expires December 31, 1941.

If the registrant has received assistance from an advisor, the latter will sign the following statement:

I have assisted the registrant herein named in the preparation of this Questionnaire.

.....
Advisor

(7)

Instructions.—Registrant shall write nothing below this line when filling out the Questionnaire.

Minute of Action on Request of Time for Filing Claim or Proof

[Followed by printed form not filled in]

Minute of Action by Local Board

The Local Board classifies the registrant in Class III, Subdivision....., by the following vote: Ayes 3, Noes 0.

July 7, 1941
(Date)

THOS. R. O'DAY,
Member.

U. S. Exhibit No. 2—(Continued)

Appeal to Board of Appeal

I hereby appeal from the classification by the Local Board in Class....., Subdivision..... November 30, 1942.

(Date) CLAIBOURNE RANDOLPH TATUM

(Signature of person appealing)

Instructions.—You must also attach here a written statement specifying the class or classes in which you think you should be placed. If you wish the appeal board to review a determination regarding your physical or mental fitness, you must fill out and sign the form for appeal on the Report of Physical Examination (Form 200) and you must attach to that form a statement specifying the class or classes in which you think you should be placed.

Minute of Action by Board of Appeal

The Board of Appeal classifies the registrant in Class I, Subdivision A, by the following vote: Ayes 3, Noes 0.

6/1/43 (Date) M. C. HERMANN Chairman Member.

I hereby appeal to the President from classification by the Board of Appeal in Class....., Subdivision..... Certificates and recommendations required by section 379, S. S. R., are attached.

(Date) (Signature of person appealing)

U. S. Exhibit No. 2—(Continued)

Minutes of Other Action

Date	
2/27/42	Classified I 3 Ayes 0 Noes F.M.
3/25/42	C.S.F. #1 Mailed M. Costello
April 23/42	Ordered for Screening & Serioligic Test 2 yrs. period [illegible]
June 1/42	Class I-A DSS 57 Mailed 2 Ayes No Noes M. Costello
July 9th 42	Class 3, Group #2. After Bulletin June 27th, 42. Mail D.S.S. 352 3 Ayes 0 Noes. Jno. J. Foley
Nov. 3rd 42	Ordered for Screening & Serioligic. 3 Ayes, 0 Noes. Jno. J. Foley.
Nov. 10 1942	Classed I-A after Screening & Serioligic 4 Ayes, 0 Noes. T. R. O'Day.
Nov. 10/42	Classified 1, A, O, after Screening and Serioligic 4 [illegible] Michael Costello Mail D.S.S. 57 M. Costello.
Nov. 20/42	Classed I, A, O, after Hearing. 3 Ayes. M. Costello. Mail D.S.S. 57.
June 16th 43	Class I-A by Appeal Board. Mail D.S.S. 57. 3 Ayes. Jno. J. Foley.
July 9th 43	Ordered for Induction. 3 Ayes. Jno. J. Foley.

Minute of Action by Board of Appeal

On January 22, 1943 the Board of Appeal reviewed this file and determined that registrant should not be classified in Class 1-C, Class IV-F, Class IV-D, Class IV-C, Class IV-B, Class IV-A (not considered in time of war), Class III-B, Class III-A, Class II-B, Class II-A, or Class I-H.

January 22, 1943.

BRIAN E. GAGNOR
Secretary

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 3

Claibourne R. Tatum
P.O. Box #4411
San Francisco, California
April 6, 1942

[Stamped]: Local Board No. 89 91 San Francisco County 075 Apr 6 - 1942 089 380 18th Avenue, San Francisco, Calif.

The Selective Service System
Local Board No. 89
San Francisco County
380 - 18th Avenue

Dear Sirs:

After having had your form letter, informing me that my case has been re-opened and that further information regarding me is required, brought to my attention, I immediately visited your offices on 18th Avenue. The gentleman in charge there requested that I write a letter noting the changes that have taken place in my family and vocational life since my filling out my "questionnaire".

In compliance with the above-mentioned request I submit the following data:—There has been no addition to my list of dependents. My wife and I are living together, and I am her only source of support. As I believe I stated in my "Questionnaire", my wife is not trained for any positions that require workers at this time; and in addition (due to a spinal condition and an incipient arthritic state) she is not in physical shape to perform manual labor of any nature.

As regards my employment. I am no longer working with the W.P.A. I have been doing odd jobs such as painting, etc., in the homes of friends and relatives.

I do not have any permanent address at the present, though when I am settled I will let you know immediately. In the mean time I can be reached through P.O. Box 4411. I do not expect to have to leave town for employment, though if such should prove to be the case I will post you as soon as it is possible.

If at any time there is any further information needed in regards to any phase of my status I stand willing to co-operate with you to the best of my ability.

Yours sincerely,
CLAIBOURNE R. TATUM
Order #1165

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 4

June 4, 1942
San Francisco, Calif.
954 Ashbury St.

[Stamped]: Local Board No. 89 91 San Francisco County 075 Jun 4 1942 089 380 18th Avenue, San Francisco, Calif.

Local Board #89
San Francisco, County.
380 - 18th Ave.
San Francisco, California

Dear Sirs:

I request an opportunity to appeal my I-A reclassificaiton before your assembled group at any time you designate for my appearance.

Sincerely,
CLAIBOURNE R. TATUM

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 5

Selective Service System
(Stamp of Local Board)

June 8, 1942

Calirbourne Randolph Tatum Order #1165
954 Ashbury Street

Mr. Tatum is active in religious way directing the thought of people in the ways of the Commandments and the teachings of Christ. He is a conscientious objector, but also has dependency.

At the present time he is working for himself. He is a proof reader for which he receives $50 a month, and for building a bomb shelter, and for blacking out the house he receives his rent. He has been doing this for 6 months. He is married but has no children.

He is an artist, and worked on the Fair Grounds of the Exposition doing construction work. In 1939 after that work was over he was out of work. He then went on W. P. A. until October of 1941 when he was on training for the ship yards. He did not wish to do this kind of work as it was helping construct a means of destruction.

His wife is totally dependent upon him. He belongs to the Church of the Heart. This is not an organized sect. They believe in the Bible and like to study.

Mr. Tatum added this:

> "I am not adverse to helping to save a life, but I rather have my own life taken than to take the life of another or help some one else.", do the same."

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 6

Special Form for Conscientious Objector
Order No. 1165

[Stamped]: Local Board No. 89 91 San Francisco County 075 Jun 6 1942 089 380 18th Avenue, San Francisco, Calif.

Name Claibourne (First) Randolph (Middle) Tatum (Last)

Address 954 - Ashbury Street (P.O. Box 4411)
(Number and street or R. F. D. route)

San Francisco, (City, town, or village) S.F., (County) California (State)

This form must be returned on or before.....
(Five days after date of mailing or issue)

Instructions

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on the special form, which when filed shall become a part of his Questionnaire.

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information only of the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the Local Board shall proceed in the ordinary course to classify him upon all other grounds of deferment, and shall consider and pass upon his claim as a conscientious objector only if, but for such claim, he would have been placed in Class I. The procedure for appeal from a decision of the Local Board on a claim for conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as

a conscientious objector: Provided, however, That the Local Board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—Claim For Exemption

Instructions.—The registrant must sign his name to either Statement A or Statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

A. [Paragraph stricken out.]

B. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participation in any service which is under the direction of military authorities.

CLAIBOURNE RANDOLPH TATUM

(Signature of registrant.)

Series II.—Religious Training and Beliefs

Instructions.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Describe the nature of your belief which is the basis of your claim made in Series I above.

I believe in the all-powerful Living God, and His Laws, (particularly, "Thou Shalt not Kill"), as described to the human race by Jesus the Christ, (particularly in his "Sermon on the Mount") * * *

That these universal maxims supercede all man-made concepts of law * * * That these axiomatic truths will permit no Christian, who understands them, to ignore or compromise with them and remain loyal to his Creator and mankind. In short, I believe in the religion of the heart.

2. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

The basis for the creed expressed above was developed in me by my mother. Because of her great and true Christian attitude toward life I was inspired, as far back as memory will serve, to regard the "Golden Rule" as the cardinal law of all life.

Since my early youth I have sought the answers to the problems which confront mankind and confuse humanity's efforts to live a life of peace and prosperity for all. I have found most of my answers in humanity as a whole, and the Bible.

D. S. S. Form 47

3. Give the name and present address of the individual upon whom you rely most for religious guidance.

I rely upon no individual for spiritual guidance. I draw my inspiration and philosophy from life as a whole, and the Bible, (specifically, its New Testament).

4. Under what circumstances, if any, do you believe in the use of force?

If the question means the use of physical violence.—None. Though if the question means the

application of the force of Christian thought coupled with Christian action then I believe in its use everywhere and at all times.

5. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

I have conscientiously endeavored to obey all civic, state, and national laws which are in conformity with the Constitution of the United States, and more important with Christian Principle.

I have been engaged for the past five and one-half years promoting the interests of Christianity for the benefit of all men * * * to my own professional and financial disadvantage, but to the great benefit of my conscience, in the capacity of an unordained minister of the Christian Philosophy.

6. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

I have lectured upon the public platform for over a period of at least three years, beginning approximately in the spring of 1937, devoting an average of from two to three evenings a week in this practice. Since I have delivered over 300 lectures in an area ranging from the city of Auburn in the north, to the city of Monterey in the south, and extensively in the Bay Area, and having no reliable record of dates and places, I am unable to supply this information.

Series III.—General Background

Instructions.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Give the names and addresses of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, private, church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Attended All dates approximate From	To
Grattan (elementary)	Public	San Francisco	1918	1922
Laguna Honda (elementary)	"	" "	1922	1925
Polytechnic High School	"	" "	1925	1929
Calif. School of Fine Arts	Private	" "	1929	1932
Guy Wiggins' Art School	"	Oly Lyme, Connecticut	1932	

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position, or job held, or type of work in which engaged:

Type of Work	Name of Employer	Address of Employer	Period Worked All dates approximate From	To
Artist Assistant	Mr. Van Sloun	Deceased	1936	1936
Laborer and helper	City of San Francisco	Palace of Fine Arts	1936	1939
Laborer	Mr. William Metcalf	2104 Castro Street	1939	1939
Artist	W.P.A. Art Project	465 Jackson Street	1939	1941
General construction, building maintenance, proof reading	(Myself)	945 Ashbury Street	1941	1942

3. Give all addresses and dates of residence where you have formerly lived:

Name of City Town, or Village	State or Foreign Country	Street Address or R. F. D. Route	Dates of Residence all dates approximate From	To
San Francisco,	California	1263 - 11th Avenue	19	1918
"	"	837 - Clayton Street	1918	1921
"	"	1317 - 37th Avenue	1921	1936
"	"	1573 - 48th "	1936	1938
"	"	846 - 36th Avenue	1938	1940
"	"	563 - 29th "	1940	1941
"	"	835 - Clayton Street	1941	1941

4. Give the name, address, and country of birth of your parents and indicate whether they are living or not.

Mrs. Zelda Douglas Jones Miller, United States of America. Deceased.

Mr. Randolph Tatum, United States of America. Deceased.

Series IV.—Participation in Organizations

Instructions.—Questions 1, 2, and 3 in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this paper.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

R.O.T.C., Polytechnic High School, San Francisco, California.

Reason: To make up deficiency in required scholastic credits.

2. Are you a member of a religious sect or organization? No. If your answer to question 2 is
(Yes or no)
yes, answer questions (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you: .....

(b) When, where, and how did you become a member of said sect or organization?.....

(c) State the name and location of the church, congregation, or meeting where you customarily attend: .....

(d) Give the name and present address of the pastor or leader of such church, congregation, or meeting: ....

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war: .....

3. Describe your relationships with and activities in all organiaztions with which you are or have been affiliated, other than religious or military:

Was an ordinary member of the "Mantle Club".

Was associated with a group composed of friends and acquaintances, whose interests were in the ideas and ideals expounded in the Bible. I acted in the capacity of student, lecturer, and, for a limited time (about 3 mos.), a chairman.

Series V.—References

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war:

Name	Full Address	Occupation or Position	Relationship to You
Mrs. Alice W. Tatum	954 Ashbury Street S.F.	Housewife	Wife
Mrs. Marian MacIntyre	943 Leavenworth St. S.F.	Teacher	Friend
Mr. Frederick Rosher	P.O. Box 2123 S.F.	Artist	Friend
Mr. Arnold E. Miller	c/o The Evening Telegram, Rocky Mount, North Carolina	Journalist	Brother

Registrant's Affidavit

Instructions.—The claim made on this form will not be considered unless it is supported by the following affidavit. (If the registrant cannot read, the questions and his answers shall be read to him by the officer who administers the oath.)

State of California,
County of San Francisco—ss.

I, Claibourne Randolph Tatum, do solemnly swear (or affirm) that I am the registrant described in the foregoing questions and answers, that I know the contents of my said answers, and that each and every statement of fact in my answers to said questions is true, to the best of my knowledge and belief.

(Registrant sign here)

CLAIBOURNE RANDOLPH TATUM

(Signature or mark of registrant)

Subscribed and sworn to (or affirmed) before me this 5th day of June, 1942.

[Seal] VINTON W. VAUGHAN

(Signature of officer administering oath)

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Nov. 20, 1943.

If the registrant has received assistance from an advisor, the advisor shall sign the following statement:

I have assisted the registrant herein named in the preparation of this form.

(Signature of advisor)

(Address of advisor)

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 7

Order No. 1165

Claibourne R. Tatum
P.O. Box #4411
San Francisco, California
November 13, 1942.

[Stamped]: Local Board No. 89 91 San Francisco County 075 Nov 16 1942 089 380 18th Avenue, San Francisco, California.

To the Members of
The Selective Service System,
Local Board #89
380 - 18th Avenue
San Francisco, California.

Dear Sirs:

Please regard this as a request by me to appear before you at any time you find convenient for the purpose of an interview regarding my recent reclassification from 3-A-2, to 1-A.

As per the instructions appearing on the "Notice of Classification", I understand that you will appoint the time for this interview, so I have made arrangements to appear before you at any time you specify.

Yours sincerely,
CLAIBOURNE R. TATUM

[In longhand]: 11-20-42 9:00 PM

[Endorsed]: Filed 11-14-43.

Page No. 77

CLASSIFICATION RECORD

1 Order Number Par. 317	2 NAME OF REGISTRANT Par. 317	3 Serial Number	4 Age	5 Race	6 Date of Volunteering for Induction	7 Date Record Transferred by or to Local Board Pars. 383 and 425	8 Date Registrant's Record Returned Pars. 383, 384 and 425	9 Date Questionnaire Mailed Par. 319	10 Return of Questionnaire Extended to Par. 320	11 Date Questionnaire Returned	12 Date Claim for Deferment Filed by Another	13 CLASSIFICATION Par. 332 I II III IV A B C D E	14 Date Notice to Appear for Physical Examination Mailed Par. 338
												~~1RO~~ ~~A~~	6-17-43
1165	Claibourne Randolph Tatum	1505	27	Wh.				5-12-41		5-17-41		X ~~A~~	11- 3-42 5-11-42

I certify that the above record is a true copy of the Name, Order and Serial Numbers and Classification record of Claibourne Randolph Tatum, Order Number 1165, as presently recorded in Classification Record 100 and 100-A of Local Board No. 89, Selective Service, of San Francisco County, California.

OLIN WELLS
Clerk of Local Board No. 89, Selective Service

D. S. .S. Form 100—Classification Record A.

Insert Page

Page No. 78

ORDER No. (Same as Col. 1 and 2)	13A CLASSIFICATION Enter current classification in first space at left and any subsequent reclassification in a separate space.	29	30	31	32	33
x 1165	1-A					

I certify that the above record is a true copy of the Name, Order and Serial Numbers and classification record of Claibourne Randolph Tatum, Order Number 1165 as presently recorded in Classification Record 100 and 100-A, of Local Board No. 89, Selective Service, of San Francisco County, California.

Form DSS-100A—
Classification Record C.

OLIN WELLS
Clerk of Local Board No. 89, Selective Service

LOCAL BOARD FOR.....

RIGHT PAGE

Page 78

15 Date Registrant Appeared for Physical Examination Par. 336	16 Date Classification by Local Board Mailed to Registrant	17 Date Requested to Appear Before Local Board Received Par. 368	18 Time Fixed for Registrant to Appear Before Local Board Par. 368 Date	Hour	19 Enter "√" if Appeared Par. 369	20 Date of Appeal to Board of Appeal Par. 373	21 Date of Forwarding Registrant's Record to Board of Appeal	22 Date Notice of Board of Appeal's Decision Mailed by Local Board Par. 377	23 Date Notice of Continuance of Classification Mailed	24 Date of Order to Report for Induction	25 Time Fixed for Registrant to Report for Transportation to Induction Station Date	Hour	26 Final Disposition at Induction Station and Date *Acc=Accepted *Rej=Rejected *Del=Delinquent	27 REMARKS Including Information on Appeals to President, Par. 380, also Pars. 344, 389, 391 All Entries in this Column to be in Red Ink	28 Order Number Par. 317 (Same as Column 1)
6-23-43	11-11-42														
11- 7-42	7- 9-42	11-16-42	11-20-42	9:00 p.m.	√	11-30-42	12-17-42	6-16-43	11-20-42						
x5-15-42	6- 1-42 7-16-41	6- 5-42	6- 8-42	2:45 p.m.	√					7-10-43	7-26-43	7:30 a.m.	Del.		1165

I certify that the above is a true copy of the Name, Order and Serial Numbers and classification record of Claibourne Randolph Tatum, Order Number 1165, as presently recorded in Classification Record 100 and 100-A, of Local Board No. 89, Selective Service, of San Francisco County, California.

OLIN WELLS
Clerk of Local Board No. 89

D.S. S. Form 100—Classification Record B.

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 9

Order No. 1165

Claibourne R. Tatum
P.O. Box #4411
San Francisco, California
November 24, 1942

[Stamped]: Local Board No. 89 91 San Francisco County 075 Nov 27 1942 089 380 18th Avenue, San Francisco, California.

To the Members of
The Selective Service System, Local Board #89
380 - 18th Avenue
San Francisco, California

Dear Sirs:—

On the evening of November 20th, 1942, I appeared before two representatives of your board. Their schedule of interviews was such that they were not able to grant me sufficient time to state my case as clearly and fully as I am certain they and I would have liked. Therefore, knowing that you will want the following information, I submit it to you to be included in your records:—

At the time of my last request for reclassification I was unable to fully state why I feel that I am fully qualified as a Christian minister. I willingly acknowledge that I am not ordained by the authority of man, in accordance with the tenets of their sects, but I hold to the fact that I am ordained by the Will of God, who is within me.— Look to the book of Ephesians, verses four, five and six of chapter four, where it says, "There is

one body, and one Spirit, even as ye are called in one hope of your calling; one Lord, one faith, one baptism, one God and Father of all, who is above all, and through you all, and in you all."

Thus we are led to an awareness of the fact that our Heavenly Father, and the Christ (which is the perfect knowledge of the universal Truth of Life) live within us—each and every one of us—; and the expression of our Divine nature is limited only by our degree of awareness and application of the power which is within us. Those persons who, by virtue of an earnest desire to live up to their capacities through the Laws of God, are impelled to help point the way to the early establishment of God's Will and God's Kingdom "on earth as it is in Heaven", are moved to this action by the Divine Spark within them. I lay no claim to "superpiety", rather I am impelled by our inner Force to go before mankind teaching the Christian Message.

Christ Jesus was not ordained by men—neither were his disciples, nor the first fathers of the Christian movement. And he taught that we can become all that he was and is, and more. None were graduated from theological colleges or seminaries, yet, who can say that they were not ministers in every sense of the word. The apostle Paul was ordained by the inner Light, not by men. In these references, I do not seek in any way to discredit the authority possessed by over 300 different religious sects and denominations to ordain men as ministers; but, I do maintain, and am borne out by

Christ Jesus' teachings, that the Power of God to ordain ministers is not limited to the confines of religious organizations any more than is the Presence of God confined to only a chosen few or distributed with biased inequality among men. Therefore, by Him who is within me, I am ordained and impelled to go before mankind and teach the fullness of the Truth as revealed by Christ Jesus; and as proof of this, I point to my long record of devotion to the task of ministering the Christ-word to the people.

I do not say that all men can be expected to be regarded as Christian ministers just through their saying such is so. One must have authority to honestly regard himself as a minister. Only by one having a concrete grasp of the fundamental Principles of Christianity, can he then speak and lead with the authority of knowledge * * * Such knowledge is the only authorization for ministerial action in existence. Hence, all men possess the inner capacity to be ministers of Christianity, and become such when they abandon their personal lives (insofar as this is possible), and become public channels for the dissemination of the Christian Doctrine—letting their works prove their faith.

I do not seek deferment to Class 4-D because I fear war. Fear is followed closely by hate, and hate is the opposite of Love,—God. I plead for this deferment because I know that I can be of greater help in preparing the public mind for the great rehabilitation program that is to follow this war. A conscientious-objectors camp does not per-

mit much latitude for any very worthwhile activity in this direction. Whereas, when one is left free to assist in the program to fit America to lead the people of the world to greater freedom, then, he is able to be of invaluable service to the people and the principles of our great nation—to the end that when this war is over, we, Americans, will be ready to take the nationally-proposed freedom-giving action in our stride of leadership.

As a Christian, I cannot condone war, nor participate in it in any way; but, as a Christian, I intend to do all that is within my power to better prepare myself and others to realize the full splendor and practical might of the coming campaign for world-wide acceptance of the fundamental Principles of Christ Jesus and the American government as being those best suited to release mankind from bondage and into an era of accomplishment beyond our most fantastic dreams.

Again, I cannot participate in war, but I can help to further the present American effort to make future wars impossible. * * * This is not a bargain, but is a statement of fact; and my heartfelt hope is that you can see the wisdom in my basis for my request. Therefore, for the good that I in my small way can do for humanity, please reconsider your present decision and reclassify me to 4-D where I rightfully shall be left free to be of Christian Service to America and mankind.

I am sincerely your,

CLAIBOURNE R. TATUM

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 10

Order No. 1165

Claibourne Randolph Tatum
954 Ashbury Street
San Francisco, California
June 29, 1943.

[Stamped]: Local Board No. 89 91 San Francisco County 075 Jun 30 1943 089 5108 Geary Blvd., San Francisco, California.

To the Members of
Local Board #89
5108 Geary Blvd.
San Francisco, Calif.

Dears Sirs:

My claim for just and proper re-classification, being legitimate and fully supported by fact, makes it impossible for me to consider the Appeal Board's 3-to-0 negative verdict, and my subsequent re-classification to class 1-A, as being final. The Appeal Board's refusal to honor my rightful claim as a Regular Minister of Religion to a 4-D classification left me with no alternative but to take the entire matter of my Selective Service status to higher authorities.

My case is now in the hands of your state director, Colonel Leitch;—with my statement of protest, accompanied by a complete copy of all recorded material in my personal Selective Service file, hav-

ing been mailed to him, and to General Hershey in Washington, D. C.

Very truly yours,
CLAIBOURNE RANDOLPH TATUM
Claibourne Randolph Tatum

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 11

Prepare in Duplicate
(Cut)

July 10, 1943
(Date of mailing)

[Stamped]: Local Board No. 89 91 San Francisco County 075 Jul 10 1943 089 5108 Geary Blvd., San Francisco, California.

ORDER TO REPORT FOR INDUCTION

The President of the United States,
To Claibourne (First name) Randolph (Middle Name) Tatum (Last name)

Order No. 1165

Greeting:

Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the armed forces of the United States, you are hereby notified that you have now been selected for training and service in the land or naval forces.
(Army, Navy, Marine Corps)

Commanding Officer, Army Induction Station #1,

You will, therefore, report to the ^ local board named above at 428 Market St., San Francisco, Calif. at 7:30 A.M., on the 26th day of July, 1943.

(Place of reporting) (Hour of reporting)

This local board will furnish transportation to an induction station of the service for which you have been selected. You will there be examined, and, if accepted for training and service, you will then be inducted.

Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940, as amended, and subjects the violator in fine and imprisonment. Bring with you sufficient clothing for 3 days.

You must keep this form and bring it with you when you report to the local board.

If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now

located, go immediately to that local board and make written request for transfer of your delivery for induction, taking this order with you.

JNO J. FOLEY
Member or clerk of the local board.

D. S. S. Form 150

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 12

Notice of Delinquency

[Stamped]: Local Board No. 89 91 San Francisco County 075 Jul 26 1943 089 5108 Geary Blvd., San Francisco, 18, California.

July 26th, 1943
(Date)

To Claibourne Randolph Tatum
(First) (Middle) (Last)

Order No. 1165

Dear Sir:

According to information in possession of this Local Board, you have failed to perform the duty, or duties, imposed upon you under the selective service law as specified below.

( ) To present yourself for, and submit to, registration.

( ) To present yourself for, and submit to induction into the land or naval forces of the United

States as ordered on the 26th day of July at the Armed Forces Induction Station, 428 Market St., San Francisco, Calif.

(Specify other)

You are therefore directed to report, by mail, telegraph, or in person, at your own expense, to this Local Board, on or before 11 A.M., on the 31st

(Hour)

day of July, 1943.

Failure to report on or before the day and hour specified is an offense punishable by fine or imprisonment, or both.

JNO. J. FOLEY
Member of Local Board

This form shall be made out in triplicate. The original shall be sent to the suspected delinquent, the duplicate shall be sent to the Governor, and the triplicate shall be filed. (Selective Service Regulations, Volume Three, Classification and Selection.)

D. S. S. Form 281

[Endorsed]: Fled 11-15-43.

U. S. EXHIBIT NO. 13

[Stamped]: Local Board No. 89 91 San Francisco County 075 Jul 31 1943 089 5108 Geary Blvd., San Francisco, 18, California.

Claibourne Randolph Tatum
954 Ashbury Street
San Francisco, California
July 30, 1943

Members of Selective Service
Local Board #89
5108 Geary Blvd.
San Francisco, California

Re: Requested reply to receipt of notice of delinquency.

Dear Sirs:

I acknowledge receipt of the "Notice of Delinquency" mailed to me dated July 26, 1943. In reply, please accept my remarks in the light of their being impersonal and very likely the last that I may have occasion to write to my board. Because of the latter factor, I will appreciate your bearing with me to the end of this letter, which is necessarily much longer than I would wish it owing to what I must state in what may be my last opportunity to express myself as fully as I am at the moment capable.

Though I was not surprised to receive the mentioned notice, frankness demands that I admit that I am very disappointed in that the Selective Service code, "Fairness and justice for all registrants", does not seem to have included me.

I freely admit that to the best of my knowledge no avenue of administrative procedure has been closed to me, save that of a Presidential Appeal, and my temporary inability to gain access to the Hearing Officer's report to the Appeal Board. However, in the course of that administrative procedure, I am convinced that prejudice, rather than fair and impartial judgment, has caused my character and in turn my case, to be seen in an improper and unjust light.

With each step of the way that I have taken in the course of my dealings with the Selective Service System, I have seriously endeavored to present convictions clearly. Either I have failed in this effort, or those to whom I have presented dissectional views of myself are, either by reason of environment and religious training, or their lax acceptance of public gossip, incapable of conceiving that I am truly a hater of war, and a lover of Christ Jesus' teachings.

Regarding this, I have repeatedly taken into consideration the fact that war psychology, and the propaganda that forms it, breeds little patience for the concepts of peacemakers. Yet, withal, it is only natural that I have such a faith in mankind as to expect a more intelligent and sympathetic attitude toward me than has been shown to date by men who not only have trained intellects to stabilize their emotions, but laws and regulations to guide them while thus empowered to treat even so unpopular a person as a conscientious objector fairly.

Had the Local Board, Board of Appeal, Hearing Officer, and both State and National S.S. Head-

quarters, really considered the facts in my case, or had inquired about those that may have seemed to be lacking, rather than to have placed such weight upon the prejudiced information injected brazenly into it, I would not have been ordered to report for induction at any time. I fully realize that it is as much the responsibility of Selective Service officials to muster men for the armed forces as it is my responsibility to remain true to the example and teachings of Christ Jesus in my ministry, and in the course of that action to refuse acceptance of military service . . . However, aside from this, I am virtually branded a liar, an insincere person, and an opportunist by persons who do not know me, nor who very likely have not read my statements throughout this case with anything but a preconceived contempt for anything that I would say. I am branded a liar in spite of ample evidence to the contrary that sustains the authenticity of my position as a regular minister, and my heartfelt abhorrence of war. All that I and others have offered in good faith it seems has been ignored . . . therefore, I do not consider myself delinquent. Rather, the Selective Service System has gradually caused me to exhaust all possible avenues of administrative action until I am at last cornered and faced with the risk of my recent action being judged a violation of civil law because I could not agree to my becoming a trained killer with the necessary forfeiture of all that I regard as Godly in my remaining faithful to the Principles that I hold to be True.

I assure you that it is most unpleasant to find oneself made the unwilling victim of unwarranted and arbitrary action on matters the outcome of which may well blight one's entire life. Such power as has been given to officials of the Selective Service System requires more discriminating use than that to which it was put while dealing with me. I cannot feel that the Selective Service System has fully abided by the spirit or the letter of its Act in regard to me.

As you doubtless know, I wrote to General Hershey and to Colonel Leitch requesting a stay of induction pending a complete and thorough investigation of my case; and that this request was accompanied by a copy of the Hearing Officer's report, together with my carefully set-forth protests against his several warped and untrue findings. I brought my case to the attention of those headquarters in the hope that reasonable and lawful steps would then be taken to correct an obvious injustice. Colonel Leitch, lastly representing both his and General Hershey's headquarters, would not relax his rigid stand, nor honor my requests in any way. I feel that I have been denied even the consideration let alone the classification a registrant in my position has a right to expect in a nation that has prided itself upon its traditional respect for the inalienable rights of its citizens. Entirely without malice, I only regret that it is possible for official indifference and akepticism to plunge one into such an intricate legal tangle as that in which I now find myself.

Perhaps, if I had stated what is to follow in the

first place long ago, letting the chips fall where they would, I should not have been misunderstood and everything might have worked out to the entire satisfaction of all concerned. But before I give you this straight from the shoulder, I must say that I do not mean to offend, nor do I indulge in attempts to sting those who have decided against me. Instead, I speak of many persons in the rank and file—a considerable portion of the general public.

It would seem that it is against the grain of some people these days for them to even pretend to understand either the views of sincere Christians or the motives that support their frowned-on attempts to explain these views. In fact, were the unfriendly attitudes taken by otherwise rational individuals toward things Christian accepted as justified, then it would seem that a true Christian (one who not only desires to live as a Christian, but does so to the best of his understanding and ability) is the most deluded, most inconsequential, and least needed creature of all that seemingly pester and irritate present-day society.

Today, it would seem that anyone who openly declares himself an uncompromising follower of Christ Jesus, automatically falls into the general category of mind that many reserved for those frail, serious, un-athletic lads of our schoolboy days who, because of their intense desire to really learn something, were regarded with scorn and suspicion as being queer, unnatural specimens — "apple-polishers". Doubtless there were a few instances when such opinions were justified, but in the main, weren't

many of us prone to abuse the scholars in an effort to justify our own lack of application? Many people have carried this juvenile trait on into their adult life where they find it useful in justifying their lack of Christian application by condemning the efforts of those who earnestly try to live up to Christ Jesus' teachings, as being insincere.

It also seems strange to me that in this so-called enlightened age there are still some who refuse to believe that one is a minister of religion unless he wears an expression as dour as his garments are considered to be (garments that are somehow supposed to greatly affect his spiritual discernment); that he must, quite unlike the Master and His disciples, bear some official credential, or stamp of approval, like an inspected slaughter house, before he is considered worthy of some people's part time, superstitious awe (miscalled respect); and lastly, that one is not acceptable as a minister of religion unless he is sufficiently stultified by dogma so as to never be so unorthodox and rash as to interfere with the "time-honored", cut-throat business policys and sweet, "spiritual" stupor of his innocently un-Christian, browsing flock, by any appallingly disturbing ideas such as the practical application of those Christian Principles that many only want to hear about in such a manner and long enough to forget with a comfortable conscience thereafter.

I can speak for "Mankind United" as well as myself when I say, that as long as the majority of the people believe that force and violence is necessary for the protection of property, life, and free-

dom, then no one has the right to undermine their faith in such means and leave them prey to those factions that worship only the right of might. However, a minister (whether ordained or not), or for that matter any religious group that does not seek to instill within the hearts of mankind the seeds of knowledge entrusted to their care by the Prince of Peace and God's will toward all men, that minister or group is failing in its sacred trust. There is no other way to fulfill the religious and ministerial task of enlightening mankind to the point of their being able to make practical use of Christ Jesus' teachings than in clarifying the relationship of these teachings to every aspect of our human existence in the spirit of "Know the Truth and the Truth shall make you free".

What does mankind wish to be free of? . . . Certainly, if governmental action and trends are a fair guide, mankind wants to be free of poverty, fear, ignorance, and war. Only by applying the counterfact of the evils that cause mankind's distress can such as greed, hate, and inequality be controlled and finally eliminated from our personal and global lives. The only counterfacts of the above evils are Love, Abundance, Equality, and Good. These are the fundamentals of Christianity, and must find expression and practical usability in our economic life, and our social life, as well as in our mental concepts if we are to realize the fulfillment of our prayer that, "Thy kingdom come, Thy will be done on earth as it is in heaven".

Christ Jesus did not preach a gospel of morality,

ethics, and the hearafter only. He preached the most powerful and practical sociocratic and socio-economic "here-and-now" gospel that has ever been given expression (and so little intelligent public attention). As long as mankind is obliged to pay homage to men whose lives are steeped in their lust for money and beastial power, mankind cannot obey the Golden Rule in any practical way . . . And it is my belief that the Christian churches have as their ultimate goal the practical application of the Golden Rule in all walks of life. These churches should welcome "Mankind United" as a sister champion of their kindred and sole interest. And be willing to accord it its place among the progressive religious bodies of society; and recognise those persons who are entrusted with the responsibility and privilege of teaching its followers the full gospel of Christ Jesus (in all of its spiritual and material ramifications), as being its officially recognised ministers.

"Mankind United" is not competing with other Christian groups, or denominations; nor am I, as a regular minister within the scope of the movement, competing with the regular or ordained ministers of those other Christian assemblies.

Neither "Mankind United" nor am I at all interested in advising men as to what and how they will think in regard to war. Not only would such advice be illegal, but of even greater importance, it is spiritually wrong. In the manner of lawyers, and after the example of Christ Jesus, mankind is informed of the Law; the benefits when it is obeyed; the penaltys when it is violated; — the

decision as to what course an individual should take thereafter is entirely his own responsibility and of his free choice. At no time do we seek to interfere with the war effort. No matter how wrong we may consider war to be, we never reach into a man's mind to direct its processes for him; for, as I say, this is even more un-spiritual than it it unlawful. But insofar as pointing the way to a real and lasting peace,—this is the sacred trust of all Christian ministers, and can never be deserted without such action being the treachery of a Judas type of thought.

All Christian ministers worthy of the name are bound in God to illustrate the fact that when man does not desire to apply the Golden Rule in a practical manner in all walks of life, he automatically chooses to relegate that Law to last place in his thoughts; . . . and this, instead of realizing that the Christian Law of "Love thy neighbor as thyself", not only is the most practical of precepts, but that it also embodies the full spirit and intention of the commandment "Thou Shalt Not Kill"; . . . and that when mankind knowingly ignors this teaching, and stupidly expects to bring order out of chaos by hating his neighbor, he will cause only greater chaos.

It is the very nature of the un-generous thoughts which have induced officials to regard me with a studied suspicion and indifference that has led mankind to division rather than unity—war instead of peace. I cannot permit such anti-Christian concepts to enter and dominate my thoughts or in any

way influence me to compromise with, or to abandon the principles that have grown to recognition within me since childhood, and that I have publicly striven for since my having become and adult.

The world is not merely engaged in another international fracas—it is now on the threshold of a new age. In their efforts to grow big enough to meet the new demands of this coming age of Love and Reason, men are suffering the pangs that always accompany resisted growth and the breaking off of bad habits of thought and deed.

"These are times which try men's souls". Indeed, each and every one of us is now being tried before the Eternal Judge in the Everlasting Court of the Universe during these days. Those who do not heed His call and hasten to stand firm upon Foundation Stones of Good as taught by Christ Jesus, will be swept away by the storm of their own making.

The blessings of the coming age of man's majority cannot be formed of the world-stuff of the present state of disorder. . . . The entire globe must undergo a complete house cleaning. If man will not of his own volition peacefully cleanse his mind of such impurities as greed, hate, and fear, then these must be self-purged from the world's consciousness just as a festered sore will break and discharge its accumulated poison.

Those of mankind who are in themselves, through their un-Christian, poisonous thoughts and acts, a toxic element in society, will, unless they change, precipitate their own destruction in the process of

this world's upheaval. It is to save such human beings from self-destruction that all true Christians are dedicated.

The coming age will require human hands to clear the debris of the present holocaust from the foundations of society, and to build a world fit to house the true expression of the Spirit of our Father, and the Brotherhood of Man. I am dedicated, as a regular minister of the Christian religion, to the purpose of saving as many of my fellow beings as possible, to fill the ranks of those Followers of Him who even now are being depended upon to take their place in the vast corps of men and women needed to protect and reclaim the best products of our centuries of progress, and to construct a framework upon which society may depend in security and peace.

As a Christian minister it is not my purpose to impose my ideas upon the people, but to bring Christ Jesus' teachings into sharp focus and contrast against the brooding background of mankind's tragic error—War—and all that it holds of grief, evil, destruction, and waste; and to aid in neutralizing those malevolent influences that are retarding, and setting-back many thousands of years the development of the souls of men.

I stand aghast at the sight of man's self-annihilation knowing what he is bringing on his head through his blind support of that most immoral of all abominations—War. (I am sure that you will agree that it is Earth's most convincing replica of

Hell.) It is beyond conception, the extent of the experiences of centuries of evil and torment men are heaping on themselves through their wilfull violation of Elemental Laws. And, I for one will not help them to increase their penalty by helping them to break those Laws; nor will I take a place by their agonized sides and assume a first-hand interest in working out my own Spiritual downfall and, more importantly, that of others by a wilfull disobedience of the Law, "Thou Shalt Not Kill"; nor can I suddenly become deaf to the voice of my conscience. My ears, that have for these many years been tuned to the entreaties of the Master, to follow and and apply His word, are now too familiar with this call not to heed it.

Christians in all ages have submitted to all manner of torture rather than to give up their convictions. Some were fed to lions, other were burned alive, and still others were left to live in states of almost unbearable ostracism. I am no better than they, therefore I do not expect to receive better treatment from unreasoning and bigoted men—but I do expect better treatment from men who are Americans after the true standard of Americanism.

It is because of the same ideas and ideals that Christ Jesus inspired in the hearts of those early Christians, that Christianity is still alive in the breasts of men, giving them the strength and courage, the intestinal and spiritual stamina to stand firm in these times against all odds. I have found this same faultless strength and guidance; and now once having found it, I refuse to have it taken from

me, nor the Principles upon which it is based—under any conditions.

I refuse to take action in violation of His Laws; nor will I help anyone else to do this. I refuse to let the Selective Service System's endorsement of unwaranted doubts as to my honesty and sincerity go unchallenged. Further, I refuse to relinquish my right to minister His Teachings and Laws to Mankind, and to follow these myself; nor do I intend to see my right to an official acknowledgement of my status as a regular minister of religion ~~to~~ go by default in my permitting the maligning opinions and erroneous conclusions that have thus far frustrated Justice to go uncontested.

No man is a free man when his very life is subject to the whims and prejudices of a minority. No nation can long remain a strong nation when the freedom of its people is periled in any way. . . . And, the shortest and most effective way to complete national mental and physical slavery is through either the unthinking or deliberate supression of man's religious expressions or his right to act according to the dictates of his conscience. Autocratic materialism, that abysmally depraved concept of "morality" in government, has led the world into a program of coldly premeditated wholesale murder; and this concept must be shunned if the people's right to religious and civil freedom is to be defended, and if they are to be helped in their establishment of a just, peaceful, and secure co-existence.

It is in the interest of Truth, Freedom, and Jus-

tice, and the people who depend upon these paramount Principles, (as well as in my own behalf as a person, as a Christian, and as a minister of that religion), that I vigorously protest against the treatment accorded me by the Selective Service System, and against its considering me delinquent in my not reporting to be inducted into a service that is not God's.

Very truly yours,
CLAIBOURNE R. TATUM
Claibourne R. Tatum . . . . #1165

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT No. 14

Registrant's Affidavit—Family Status and Dependents

Order No. 1165

[Stamped]: Local Board No. 89 91 San Francisco County 075 Oct. 21 1942 089 380 18th Avenue, San Francisco, California.

Name: Claibourne Randolph Tatum
(First) (Middle) (Last)
954 Ashbury St.
(Number and street or R. F. D. route)
San Francisco S. F. California
(City or town) (County) (State)

Notice to Registrant

You are directed to fill out this form and mail it to the above local board on or before the date shown

below. Be sure that it is complete in every detail and that your signature is properly notarized.

This affidavit must be returned on or before October 28, 1942.

State of California,
County of San Francisco—ss.

Family Status and Dependents (Confidential except as to names and addresses)

1. I am— ( ) single; ( ) widower; ( ) divorced;
(Put an X in the correct box)

(X) married. We were married at San Francisco, on May 4, 1936.
(Place) (Date)

(X) I live with my wife. We have lived together continuously since May 4, 1936.

( ) I do not live with my wife. Her address is .....

Explanation .....

[Stamped]: Local Board No. 89 91 San Francisco County 075 Oct 27 1942 089 380 18th Avenue, San Francisco, California.

2. I have no children (my own or adopted) under 18 years of age. Of these children.....
(Number) (Number)
live with me in my home.

Instructions.—Every registrant who lives in a family group and contributes to the support of that group shall fill in statement No. 3. "Family group" as used in this statement means two or more persons related by blood, marriage, or adoption, who live together.

3. The following is a list of all members of the family group in which I live (list yourself first):

Name	Sex	Date of Birth Mo.	Day	Yr.	Relationship to me	Total amount earned by each person in past 12 months	Total amount of all other income received by each person in past 12 months	Total amount contributed by each person to the family group in past 12 months
Claibourne R. Tatum (Enter your own name on above line)	Male	3	15	13	Self	$850.*	none	$850.*
Alice W. Tatum	F.	7	23	09		none	none	none

* See note—Question #15.

Instructions.—Every registrant who contributes to the support of one or more persons who are not members of the family group listed above shall fill in statement No. 4.

4. The following persons who are not members of the family group listed above depend wholly or partly for support on what I earn by my work in my business, occupation, or employment; they had no other sources of income during the past 12 months, except as stated below:

Name	Sex	Age	Relationship to me	Date when I began contributing to this person's support	Amount contributed by me to this person during past 12 months	All other income received by this person during past 12 months
None						

5. Listed below are all the following living members of my family: Father, mother, brothers, and sisters.

Name of Relative	Age	Relationship to me	Present Address of Relative	Approximate average earnings of each person per week	How much does each person contribute to the support of any of your claimed dependents?
Mary Elizabeth Miller	18	Sister	111 W. Washington St.	$ 22.	Nothing
Arnold Ernest Miller	21	Brother	111 W. Washington St. Greensboro, N.C. Apt. #205	25.	Nothing

Employment Status of Registrant's Wife

6. My wife is not working at a job for pay.
(Is or is not)

7. She is employed by..... as .....
(Employer) (Position or kind of work)

8. Her average earnings are $.....per.....
(Week, month, or year)

Her Social Security No. is—None

9. She was last employed on December 22, 1936
(Date employment ended—if never employed, so state)
by Shrine Hospital Association as Attendant Nurse
(Name of wife's former employer) (Wife's former position or kind of work)

10. She left her employment for the following reasons: Voluntarily:—Nervous Breakdown.
(Voluntarily—discharged—state reason)
Arthritic back and limbs—muscle spasms. Completely unable to work.

Employment Status of Registrant

11. The job I am now working at is General Household Maintenance—Proof-reading.
(Give full title of your job, such as construction draftsman, automatic turret lathe operator, dairy farm hand, stationary engineer, salesman, etc.)

12. I do the following kind of work—House-painting; excavation for Bomb-shelter; reading manuscript for context continuity and accuracy.
(Be specific in giving description of your duties—state exactly what you do.)

13. My employer is—Self-employed
(Name of company or proprietor—if working for yourself, write "self-employed")
954 Ashbury St., S. F.
(Address of place of employment—street, rural route, city and State)

14. The business in which I work is General Household Maintenance—Proof-reading.
(Give specific kind of farm, factory, mine, public utility, transportation, store, or other establishment or business in which you work)

15. I have worked at this job since November, 1941
(Date)
My average earnings are $70.00 per month.
(Week, month, or year)

*We receive our lodging for services rendered amounting to the value of $20.00 per month—this is included in stated earnings.

Registrant's Affidavit

Instructions.—1. Every registrant shall make the registrant's affidavit. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.

I, Claibourne Randolph Tatum, do solemnly swear (or affirm) that I am the registrant named and described in the foregoing statements in this affidavit; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are in my own handwriting. (are, are not)

Registrant sign here

CLAIBOURNE R. TATUM

(Signature or mark of registrant)

*Subscribed and sworn to before me this 27th day of October, 1942.

[Seal] N. A. SALA

(Signature of Officer)

Notary Public

(Designation of Officer)

*Selective Service oaths may be administered by any civil officer authorized to administer oaths generally, any member of the Selective Service System, any Postmaster, Assistant Postmaster, or Notary Public. No fee should be charged for this service.

D.S.S. Form No. 41.

[Endorsed]: Filed 11-15-43.

U. S. EXHIBIT NO. 15

San Francisco, Dec. 9th, 1942.

Board of Appeal No. 7,
Mills Bldg., San Francisco.

Dear Sirs: In re Claibourne R. Tatum, Order No. 1165.

Registrant above named specifies the respects in which he believes Local Board No. 89 erred in classifying him 1.A.O. as follows:

I.

The evidence shows that registrant, aged 29 years, is a public teacher of Christian Philosophy. He also earns $70.- per month doing house painting, proof-reading, etc. He was married in 1936. His wife has been unable to work since her marriage. In the 12 months prior to Oct. 27, 1942, registrant contributed $850.- to her support. Neither he nor she have any property, or any income except his earnings. They rent their home, paying ~~$42.~~ $20.- per month therefor Reference is particularly made to registrant's letter addressed to the Local Board, dated Nov. 24, 1942, giving his reasons for believing that he is entitled to a IV.D. classification, and to the affidavits filed in support of such letter. See also letter of Dec. 13, 1942 annexed hereto.

II.

Registrant believes that he should have been classified either III.A. or IV.D. or IV.E.

CLAIBOURNE R. TATUM

Subscribed and sworn to before me this 14th day of Dec., 1942.

ORVILLE C. PRATT Jr.
Government Appeal Agent for
Local Board No. 89.

[Endorsed]: Filed 11-16-43.

DEFENDANT'S EXHIBIT A

Report of Hearing Conducted by the Department of Justice Pursuant to Section 5(g) of the Selective Service Training and Service Act of 1940.

In Re: Claibourne R. Tatum (Conscientious Objector)

Appeal From
Local Board No. 89

San Francisco, San Francisco County, California
Appeal Board No. 7
File No. 25-11657
25-5772

[Stamped]: Board of Appeal No. 7 May 16 1943. Rm. 635 Mills Building, San Francisco.

PRELIMINARY STATEMENT

Name and Present Address of Registrant:
Claibourne R. Tatum
954 Ashbury Street
San Francisco, California

Defendant's Exhibit A (Continued)

Questionnaires Filed:

D. S. S. Form 40—May 17, 1941

D. S. S. Form 47—June 5, 1942

Nature of Claim for Exemption:

From both combatant and noncombatant military service.

Action by Local Board:

Classified 1-A-O.

Action by Board of Appeal:

Board of Appeal reviewed this file and determined that registrant should not be classified in Class 1-C, Class IV-F, Class IV-D, Class IV-C, Class IV-B, Class IV-A (not considered in time of war), Class III-B, Class III-A, Class II-B, Class II-A, or Class I-H, January 22, 1943.

Date File Received by Department of Justice:

January 29, 1943.

Date File Received by Hearing Officer:

March 20, 1943.

Date of Giving Notice of Hearing:

March 20, 1943.

Hearing Held Pursuant to Notice:

At Room 449, Post Office Building, 7th and Mission Streets, San Francisco, California, on March 30, 1943.

Registrant personally appeared at the hearing in response to the notice mailed him. He was

Defendant's Exhibit A (Continued)

accompanied by his wife, and Mr. and Mrs. Frederick W. Rosher, who all made statements in his behalf.

STATEMENT OF FACTS

1. Registrant was born March 15, 1913 at San Francisco, California. His education consisted of eight years of elementary school, four years of high school, three years at the California School of Fine Arts, five months at the Art Students League, and four months at the Guy Wiggins Art Academy. Registrant is presently employed as a proof reader for the Timely Books Library.

2. The hearing developed the following facts:

Registrant stated that he is not a member of any church, but as a child attended the Episcopal Church with his mother, and from the time he was six to sixteen years of age attended various Methodist churches; that he is now a member of the organization known as "Mankind United", and from 1937 until approximately two years ago delivered sermons for this organization; that although he is not now delivering sermons for Mankind United, he is preparing sermons and doing research work for sermons, which will be used at some indefinite future date for publication or delivery. Registrant further stated that because of his past work for this organization, and the work that he is now doing, he considers himself to be a minister of religion, and desires to be classified as such. In this regard, registrant submitted a lengthy document at his hear-

Defendant's Exhibit A (Continued)

ing setting forth the basis for his claim as a minister of religion. The Hearing Officer has placed this paper in registrant's Selective Service file.

Concerning registrant's claim as a conscientious objector to both combatant and noncombatant military service, he stated that he is a conscientious objector to war because he is a minister of religion. He said that he is not willing to accept noncombatant service in so far as he would be helping others to do what he is not personally willing to do; that he would be aiding and abetting the war effort in that he would be replacing someone that could carry a gun.

The Hearing Officer questioned registrant regarding the manner and under whose direction he would deliver his sermons for Mankind United. The registrant replied that he would receive a call from a Bureau Manager, for instance it might be from a certain Mr. Leon in Oakland, California, the address of whom he did not know or does not presently know. This Bureau Manager would instruct registrant to come to Oakland to present a sermon. The Hearing Officer asked registrant what he received for delivering these sermons. The registrant replied that he received nothing beyond his expenses; if the trip were just to Oakland he would be refunded for his gasoline for his car; if the trip were to such a distance that he had to stay over night he would be refunded for the cost of a hotel room also. Registrant went on to say that he, Frederick W. Rosher, and George G. Ashwell were the

Defendant's Exhibit A (Continued)

three men recognized up and down the Coast as the official ministers for Mankind United; that they received no salary for doing this work; that the average collection taken at a meeting would not exceed $10.00, which fact could be verified by checking with the Department of Internal Revenue.

The Hearing Officer questioned registrant as to his present means of livelihood. He replied that he helps to defray his rental by doing general work in the boarding house in which he and his wife reside; that to defray their personal expenses he does proofreading for the Timely Books Library in San Francisco; that he has done this work since November, 1941. The Hearing Officer asked the registrant the address of this library, to which the registrant replied that he did not know. The registrant further stated that he is not on a regular salary, but receives about $50.00 per month; that he depends entirely upon this wage for his livelihood; and that his wife does not work. Later in the hearing, registrant admitted that his wife also does proofreading for the Timely Books Library, but does so to help him, and her earnings go in with his.

Registrant was accompanied at the hearing by his wife, who stated she is also a member of Mankind United, and that she endorses registrant's claims as a minister 100%.

Registrant was also attended by Frederick W. Rosher. This witness stated that he is a member of Mankind United, and that he once delivered sermons for Mankind United, and is presently prepar-

Defendant's Exhibit A (Continued)

ing sermons to be delivered or published at some future date; that he too works for Timely Books Library; that his salary is approximately $25.00 per month, and that this is the means of his entire subsistence. Concerning registrant's claims, this witness stated that he has known registrant for six years; that he believes is registrant's sincerity, high principles, and consistency in his stand as a min ister; and that he has heard him preach many times.

Mrs. Frederick W. Rosher also attended the hearing. She stated that he is a member of Mankind United; works for Timely Books Library for which she receives approximately $25.00 per month; that she is also a free lance writer, but at the present time has nothing in publication. She testified that she has known registrant since the fall of 1941; that she endorses his sincerity and stand entirely; that in the time she has known him she has found him to be very high principled and entirely sincere in his appeal as a minister of religion; that she personally believes that he should be classified as a minister.

3. A review of the investigative report of the Federal Bureau of Investigation in this case is as follows:

Registrant was personally interviewed as follows:

Question. How long have you been associated with the Mankind United movement?

Answer. 6½ years.

Question. Have you attended meetings since December 7, 1941?

Defendant's Exhibit A (Continued)

Answer. No.

Question. Have you ever conducted or addressed a Mankind United meeting? If so, describe.

Answer. Yes, several hundred occasions.

Question. What subjects did you discuss and from whom did you receive instructions as to what to say?

Answer. Mankind United—from textbook "Mankind United" and copy-righted literature.

Question. How much money have you invested in U. S. Savings bonds and stamps?

Answer. None, since I feel personally that I would be buying war equipment I am not willing to use.

Question. Have you been instructed by Mankind United officers that you are a Christian minister of religion?

Answer. No.

Question. Before you were so advised, did you believe that your Bureau managers, officers, divisional superintendent, or yourself, were ministers of religion?

Answer. I was not advised but did and do believe that some come under this heading.

Question. Have you at any time heard Bureau (Mankind United) officers say that Mankind United is not a religion but a business organization?

Answer. The textbook states that it is non-religious, but this needs qualifying.

Question. Have you ever been advised by any

Defendant's Exhibit A (Continued)

Mankind United member to become a conscientious objector?

Answer. No.

Question. Have you ever counseled anyone outside Mankind United to join the organization and become a conscientious objector?

Answer. No.

Question. Have your feelings regarding the draft or conscription been influenced by Mankind United?

Answer. No. Much data regarding war and its effects have been gained from Mankind United, but basic feeling is my own.

A Clerk of Local Board #89 stated that registrant had been in to the draft board on at least twelve different occasions; that he did not believe registrant was sincere in his conscientious objector claims, because he seemed to be "over-drawing the picture for himself". Informant based his opinion on the answer given by registrant to the question of what he would do if he saw a Japanese man assaulting a white woman or his wife on the street, to which registrant's reply was that he would take no combative action but would merely plead with the Japanese to stop his brutality. Informant believes registrant is a mild mannered egotist who is enamored with his own public speaking ability and the attraction he has for middle aged women.

A former neighbor stated that registrant held meetings at which 25 or 30 people attended; that he distributed handbills and pamphlets throughout

Defendant's Exhibit A (Continued)

the neighborhood which stated that war was coming and to prepare against it.

Another former neighbor stated that registrant was very artistic and spent a great deal of his spare time while a boy in drawing; that he did not play rough games with other boys in the neighborhood and seemed to be somewhat of a moody person and she had often befriended him and tried to help him. Informant advised that registrant attended Sunday School at the Calvary Methodist Church; that he was married about 1936 and that he worked on WPA for several years thereafter. She said that she has not seen him for two or three years and the last time she saw him he tried to interest her in Mankind United and sell her one of the Mankind United books; that she was surprised to learn he was a conscientious objector and said he had always been a sincere, honest and truthful boy and young man, and if he told her he was a conscientious objector opposed to participation in war she would believe it was a genuine religious conviction on his part.

The Dean of Boys and Vice-Principal of Polytechnic High School, advised that registrant attended from 1928 to 1930, and that his record showed he registered in ROTC for three semesters and that he failed in the last semester; that ROTC is purely voluntary in the San Francisco high school and that it would not be possible to make up in regular physical education courses.

Defendant's Exhibit A (Continued)

Another informant advised he has known registrant since 1938 and that registrant usually led the Mankind United group which met on Tuesday or Friday nights in the Monterey Hall located at Monterey Boulevard and Congo Streets. He stated that from 75 to 100 persons would meet for the lecture and that the speaker was introduced as the "Voice of Truth". He stated that registrant discussed the Sermon on the Mount and the New Testament teachings of Christ in his lectures. These meetings were held for about a year and a half, and the last was held during the summer of 1941. Informant advised that although he is presently a member of Mankind United and attends Mankind United meetings, he has not seen registrant since he stopped lecturing until last November when registrant asked him to sign an affidavit for him. Informant advised that registrant had never stated he would not be able to participate in war but that he did not understand how a man with religious principles of registrant could join the army. He said registrant had often lectured on the commandment "Thou Shalt Not Kill."

Another informant advised registrant led the discussions in the Monterey Hall for about six or eight months during the years 1940 and 1941; that registrant lectured on metaphysics which he described as something like Christian Science and which taught that man is made in the image of God and that if God can do all the things why can't man do the same things, provided he has sufficient

Defendant's Exhibit A (Continued)

mental understanding. Informant said registrant also lectured on the various phases of the Sermon on the Mount, the Golden Rule, and the commandment Thou Shalt Not Kill; that registrant had never stated in so many words that he could not participate in war but registrant's lectures were against war and against violence or combat of any kind and that it would be inconsistent with registrant's religious beliefs if he actively participated in the war; that registrant was not opposed to this war alone but to all wars.

This informant further advised he had never heard of the "Church of the Heart" and did not know whether registrant had any connection with such a group. He advised that Mankind United had changed its policy during the summer of 1941 and had discontinued sending out lecturers and had mailed out printed matter and mimeographed matter instead, and he has not heard registrant lecture since this change of policy. The reason for the policy was to get away from personality, as when personality entered into religious groups they almost invariably get away from the real teachings of Christ. He stated he had not seen registrant since he signed the affidavit for him in November and he had not seen him for six or seven months prior to that time. He stated that when registrant asked him to sign the affidavit he stated Mankind United was still in his heart, but did not say anything more with regard to the movement.

Defendant's Exhibit A (Continued)

An occupant of the same house in which registrant resides, also a conscientious objector, stated that he first met registrant at the California School of Fine Arts in 1931 or 1932; that he has known him intimately as a friend since that time. He stated registrant has repeatedly expressed himself against the use of force or violence of any kind, and that war is wrong. He said these statements were made by registrant at numerous times from 1936 to the present time. He said registrant tried to prevent the present war, which he knew was coming, through the medium of lectures and teaching under the sponsorship of Mankind United; that registrant lectured for Mankind United for several years, and stopped lecturing about a year and a half ago because his perosnality was too strong and that his action was in ccordance with the policy of Mankind United in trying to get away from personalities; that registrant has been studying religious subjects for the last 1½ years in preparation for further teaching, but did not know when registrant would resume his teaching. He said registrant does odd jobs around the house and works on the bomb shelter in the rear in return for board and room for himself and his wife. Informant further advised that the Church of the Heart must be a group of persons who have a common or communal interest in certain things and think about the same things at the same time. He says he does not believe that this group holds any meetings at the present time.

Registrant's grandmother was interviewed and

Defendant's Exhibit A (Continued)

stated that registrant has always been oppoed to killing; that about 1935 or 1936 he became interested in the Mankind United movement and has been very much interested in the movement since that time. She said he tried to interest her in the movement and she read one of the books he left with her. She thought the book very silly and impractical, and forbade registrant to mention Mankind United or its principles around her home; that a couple of years ago registrant stated he could not fight or even help indirectly in any war because this would be against his religious principles and would be directly opposed to the commandment "Thou Shalt Not Kill". She said she believes registrant is sincere and genuine in his religious conviction against participation in war and that his conscientious objection is not based on any fear which he might have that he would be killed if he were in the army. She stated she has a son who is a captain in the U. S. Army and who things registrant is a crackpot. She stated registrant has often stated that it was terrible that his uncle was in the army. She does not know what registrant is doing for a living, but believed it had some connection with the Mankind United movement.

An informant, Chiropractor, advised he first met registrant in 1937 or 1938 when he was intensely interested in Mankind United; that registrant lectured five or six nights per week on various subjects based on the teachings of Jesus Christ and especially the Sermon on the Mount; that registrant

Defendant's Exhibit A (Continued)

also lectured on the metaphysical use of thought instead of violence or force; that registrant had stated he would be unable to take up arms himself because of his religious convictions; that he believed registrant was sincere in his lecturing. He advised he last heard registrant lecture about a year and a half ago and did not see him again until registrant came to his office and requested him to sign an affidavit in regard to his lecturing. Registrant stated he desired the affidavit in connection with his application for a chaplain's position and that he thought he could do the most good at this type of work. Informant said he has not seen registrant since he signed the affidavit; that he himself had given up his interest in Mankind United about a year and a half ago.

Registrant's step-father was interviewed and advised that registrant was always violently opposed to war as a boy and that when the topic of war was discussed he would become very excited and enter into heated discussions against war. He said registrant as a boy and young man was very quiet and a little odd. He further advised that he has not seen registrant to talk to since 1936 when registrant's mother died.

A former neighbor of registrant stated that registrant moved from that address, and stated that his superiors in Mankind United would not allow him to live with anyone not affiliated with Mankind United.

Defendant's Exhibit A (Continued)

Another informant stated registrant never stated in so many words he was conscientiously opposed to war but that his lectures told of the horrors and futility of war and of the attempts of the movement of Mankind United to prevent the war which they saw was coming. He said he believes registrant to be a sincere, genuine person.

A former landlady of registrant stated that while he lived in one of her houses from 1936 to 1938 he became very interested in the Mankind United movement and spent a great deal of time practicing speeches which he said he delivered in various cities on the peninsula south of San Francisco. She said he never discussed the war or made any statements which would lead her to believe he was a conscientious objector.

Registrant's half-sister, advised that registrant had always been violently opposed to war as far back as she could remember and that particularly since 1936 when he became affiliated with the Mankind United movement he has repeatedly brought up the subject of war and has stated that in the war which he expected to come he would not fight in the war or work to produce machines which could be used to kill others. She says Mankind United is a fanatical movement but that registrant is a firm believer in the movement. She further advised that he is an extreme type of person who would rather die than give up a religious ideal or conviction, and that she believes him to be sincere and truthful in his state-

Defendant's Exhibit A (Continued)

ments regarding his religious convictions against any type of participation in war.

Registrant's wife advised that they were married in 1936 and that she knew registrant approximately four years before they were married; that registrant has always been opposed to participation in war and that he believes in the Bible teachings of loving one's neighbor and "Thou Shalt not Kill". When questioned regarding registrant's training for work in the shipyards during the year 1940, she said that he did take some training for a few weeks but gave it up because he felt he could not aid in the war effort by helping to build ships which would carry supplies or munitions. She advised that the "Church of the Heart" is not a religious group of persons, but the words mean that each one of us "is a temple within himself". She said that her husband at the present time is not a leader of any group of persons, either religious or non-religious, and that it has been over a year and a half since he lectured for Mankind United; that registrant spends approximately half of his time in building maintenance work at their residence and that the other half of his time is spent in study and reading the Bible in order to develop his understanding so that he can be of greater assistance to others when the war is over. She further advised that he does not intend to teach or lecture until the war is over.

Two other informants were unable to recall any statements made by registrant in regard to conscientious objections to war.

Defendant's Exhibit A (Continued)

A younger half-brother of registrant at Greensboro, North Carolina, stated registrant was opposed to war and all types of violence even before 1936. He holds the view that it is wrong to kill under any circumstances. Informant does not agree with this view of the registrant, but believes there is no doubt as to the registrant's sincerity in his view; that registrant was opposed to war before he joined any organization having opposition to war as its purpose, but has been very active in a peace movement known as "Mankind United" in recent years. His opposition is to wars in general and not to this particular war. Informant is unable to state the basis of the registrant's views. He says their mother was very much opposed to war, but does not know that this is the basis of the registrant's views. Informant does not know whether the registrant is a member of any church, but says that they attended the Methodist church as children.

FINDINGS OF FACT

Notwithstanding the fact that informants listed in the investigative report of the Federal Bureau of Investigation state that the registrant is conscientious in his religious beliefs, and notwithstanding the fact that the registrant himself protests vehemently that his religious beliefs would prevent him from participating in combatant and noncombatant military service, the Hearing Officer concludes that the registrant cannot be believed, this for the following

Defendant's Exhibit A (Continued)

reasons: Although registrant has worked for the Timely Books Library since November, 1941, he states that he does not know the address of the library. Although registrant states his entire income does not exceed $50.00 per month, for the subsistence of both him and his wife, they appeared at the hearing very well dressed.

It is apparent to the Hearing Officer that the registrant is not telling the truth regarding his present activities with reference to the fact that he is presently writing sermons which he contends he will use at some indefinite future time. He is not presently connected with any religious group, and is not presently giving sermons; and his whole demeanor belies his contentions that he is basing his claim to nonparticipation in the war effort on religious belief and training.

The registrant insists that he is a minister, and that his conscientious objector's claim is based upon the fact that he is a minister. Under no stretch of the imagination can the registrant be considered a minister of the Gospel. He is not and has not been connected with any recognized religious group or organization, and has lectured on the Bible as a free lance. His recent affiliation has been with "Mankind United", the leading members of which organization were recently indicted by the Government, one of them being George G. Ashwell, whom registrant listed as being one of the lecturers on a par with himself.

Defendant's Exhibit A (Continued)

Another Mankind United leader, recently indicted by a Los Angeles federal grand jury on charges of conspiring to violate the sedition statute, was Arthur L. Bell. This man appeared before this Hearing Officer as a conscientious objector, and his appeal as such was denied. The investigative report of the Federal Bureau of Investigation in this case disclosed the fact that Mr. Bell, under the alias of Mr. Browne, rented a room at a San Francisco hotel under the name of "The Timely Books Bureau". This is the organization for which registrant and his wife admitted they were working, but of which they would not divulge the address.

The scheme or plan "Mankind United" is not religious in substance or nature, and the Hearing Officer is of the opinion that registrant can make no claim to conscientious objection to participation in war because of his affiliation with this movement.

CONCLUSION

The Hearing Officer finds that registrant is not "by reason of religious training or belief" conscientiously opposed to either combatant or noncombatant military service, and therefore recommends that his appeal be denied, and further that he be reclassified to 1-A.

Dated: April 9, 1943.

HUGH K. McKEVITT
Hugh K. McKevitt
Hearing Officer.

[Endorsed]: Filed 11-16-43.

DEFENDANT'S EXHIBIT B

To Whom It May Concern:

I, through my own personal experience, know that Mr. Claibourne Randolph Tatum, devoted a large portion of his time for a period of 4 years, starting with the year 1938, to public lecturing in which he instructed and admonished many hundreds of people to study and apply, to the best of their spiritual understanding, the fundamental principles of Christianity to all phases of human endeavor; and to accept the teachings of Christ Jesus as their guides to the practical realization of a righteously full and normal life.

I bear witness to the fact, that owing to Mr. Tatum's public teaching of the Christian Philosophy, as a practical medium for living a better life, he has helped me to better understand the teachings of Christ Jesus.

I also bear witness to the fact, that the entire cause of Christianity has been, and continues to be furthered in the lives and minds of men by virtue of Mr. Tatum's constant and vigorous public instruction based on Christ Jesus' message to humanity.

Mr. Tatum has always advocated strict obedience to the Constitution and the Bill of Rights of the United States of America, and all laws which are legally sanctioned by these greatest of national documents. Therefore, after carefully considering my first-hand knowledge of Mr. Tatum's public life as a teacher of Christianity, I willingly state, without any mental reservations whatsoever, that I regard

Mr. Tatum to be a minister of the Christ Idea, the gospel of the religion of the heart, which same is the full embodiment of the Ideas and Ideals of Christ Jesus' Golden Rule and the Sermon on the Mount.

I, H. Brand, do solemnly swear (or affirm) that I have read and subscribe to all of the foregoing testimony, that I have personally inserted the numerals appearing in the places hereon designated for them, that I waive all of my rights pertaining only to Mr. Tatum's use of this affidavit, and grant to him full authority, and to any and/or all persons that he may at any time select, to use this affidavit in whatever way he may desire in accordance with his own judgement, that I, of my own freewill, undersign this affidavit to indicate that I declare each and every statement contained therein to be true to the best of my knowledge and belief.

Testifier's signature
H. BRAND
Address of testifier
9 Decatur St., S. F.

Subscribed and sworn to (or affirmed) before me this 13th day of November, 1942.

[Seal] CHAS. L. WYRNO
Notary Public in and for the City and County of San Francisco, State of California.
My Commission Expires December 26, 1943.

[Endorsed]: Filed 11-16-43.

DEFENDANT'S EXHIBIT C

To Whom It May Concern:

I, through my own personal experience, know that Mr. Claiborne Randolph Tatum, devoted a large portion of his time for a period of 4 years, starting with the year 1937, to public lecturing in which he instructed and admonished many hundreds of people to study and apply, to the best of their spiritual understanding, the fundamental principles of Christianity to all phases of human endeavor; and to accept the teachings of Christ Jesus as their guides to the practical realization of a righteously full and normal life.

I bear witness to the fact, that owing to Mr. Tatum's public teaching of the Christian Philosophy, as a practical medium for living a better life, he has helped me to better understand the teachings of Christ Jesus.

I also bear witness to the fact, that the entire cause of Christianity has been, and continues to be furthered in the lives and minds of men by virtue of Mr. Tatum's constant and vigorous public instruction based on Christ Jesus' message to humanity.

Mr. Tatum has always advocated strict obedience to the Constitution and the Bill of Rights of the United States of America, and all laws which are legally sanctioned by these greatest of national documents. Therefore, after carefully considering my first-hand knowledge of Mr. Tatum's public life as a teacher of Christianity, I willingly state, without

any mental reservations whatsoever, that I regard Mr. Tatum to be a minister of the Christ Idea, the gospel of the religion of the heart, which same is the full embodiment of the Ideas and Ideals of Christ Jesus' Golden Rule and the Sermon on the Mount.

I, Henry F. Papenhausen, do solemnly swear (or affirm) that I have read, and subscribe to all of the foregoing testimony, that I have personally inserted the numerals appearing in the places hereon designated for them, that I waive all of my rights pertaining only to Mr. Tatum's use of this affidavit, and grant to him full authority, and any and/or all persons that he may at any time select, to use this affidavit in whatever way he may desire in accordance with his own judgement, that I, of my own freewill, undersign this affidavit to indicate that I declare each and every statement contained therein to be true to the best of my knowledge and belief.

(Testifier's Signature):
HENRY F. PAPENHAUSEN
(Address of Testifier):
595 Victoria St.
San Francisco

Subscribed and sworn to (or affirmed) before me this 12th day of November, 1942.

[Seal] JOHN H. COKELEY
Notary Public in and For The
County of San Francisco
State of California.

To Whom It May Concern:

I, through my own personal experience, know that Mr. Claibourne Randolph Tatum, devoted a large portion of his time for a period of 3 years, starting with the year 1938, to public lecturing in which he instructed and admonished many hundreds of people to study and apply, to the best of their spiritual understanding, the fundamental principles of Christianity to all phases of human endeavor; and to accept the teachings of Christ Jesus as their guides to the practical realization of a righteously full and normal life.

I bear witness to the fact, that owing to Mr. Tatum's public teaching of the Christian Philosophy, as a practical medium for living a better life, he has helped me to better understand that teachings of Christ Jesus.

I also bear witness to the fact, that the entire cause of Christianity has been, and continues to be furthered in the lives and minds of men by virtue of Mr. Tatum's constant and vigorous public instruction based on Christ Jesus' message to humanity.

Mr. Tatum has always advocated strict obedience to the Constitution and the Bill of Rights of the United States of America, and all laws which are legally sanctioned by these greatest of national documents. Therefore, after carefully considering my first-hand knowledge of Mr. Tatum's public life as a teacher of Christianity, I willingly state, without any mental reservations whatsoever, that I regard Mr. Tatum to be a minister of the Christ Idea, the gospel of the religion of the heart, which same is

the full embodiment of the Ideas and Ideals of Christ Jesus' Golden Rule and the Sermon on the Mount.

I, Alice L. Papenhausen, do solemnly swear (or affirm) that I have read and subscribe to all of the foregoing testimony, that I have personally inserted the numerals appearing in the places hereon designated for them, that I waive all of my rights pertaining only to Mr. Tatum's use of this affidavit, and grant to him full authority, and any and/or all persons that he may at any time select, to use this affidavit in whatever way he may desire in accordance with his own judgement, that I, of my own free-will, undersign this affidavit to indicate that I declare each and every statement contained herein to be true to the best of my knowledge and belief.

(Testifier's signature):

ALICE L. PAPENHAUSEN

(Address of Testifier):

595 Victoria Street
San Francisco, Calif.

Subscribed and sworn to (or affirmed) before me this 14th day of November, 1942.

[Seal] JOHN H. COKELEY

Notary Public in and for the City & County of San Francisco State of California

My Commission Expires Sept. 3, 1945.

To Whom It May Concern:

I, through my own personal experience, know that Mr. Claiborne Randolph Tatum, devoted a large portion of his time for a period of 3 years, starting with the year 1938, to public lecturing in which he instructed and admonished many hundreds of people to study and apply, to the best of their spiritual understanding, the fundamental principles of Christianity to all phases of human endeavor; and to accept the teachings of Christ Jesus as their guides to the practical realization of a righteously full and normal life.

I bear witness to the fact, that owing to Mr. Tatum's public teaching of the Christian Philosophy, as a practical medium for living a better life, he has helped me to better understand the teachings of Christ Jesus.

I also bear witness to the fact, that the entire cause of Christianity has been, and continues to be furthered in the lives and minds of men by virtue of Mr. Tatum's constant and vigorous public instruction based on Christ Jesus' message to humanity.

Mr. Tatum has always advocated strict obedience to the Constitution and the Bill of Rights of the United States of America, and all laws which are legally sanctioned by these greatest of national documents. Therefore, after carefully considering my first-hand knowledge of Mr. Tatum's public life as a teacher of Christianity, I willingly state, without any mental reservations whatsoever, that I re-

gard Mr. Tatum to be a minister of the Christ Idea, the gospel of the religion of the heart, which same is the full embodiment of the Ideas and Ideals of Christ Jesus' Golden Rule and the Sermon on the Mount.

I, Arie Radder, do solemnly swear (or affirm) that I have read, and subscribe to all of the foregoing testimony, that I have personally inserted the numerals appearing in the places hereon designated for them, that I waive all of my rights pertaining only to Mr. Tatum's use of this affidavit, and grant to him full authority, and any and/or all persons that he may at any time select, to use this affidavit in whatever way he may desire in accordance with his own judgement, that I, of my own free will, undersign this affidavit to indicate that I declare each and every statement contained therein to be true to the best of my knowledge and belief.

(Testifier's Signature):

ARIE RADDER

(Address of Testifier):

425 Congo Str.
San Francisco, Calif.

Subscribed and sworn to (or affirmed) before me this 14th day of November, 1942.

[Seal] THOMAS VALERGA

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires May 9, 1946.

To Whom It May Concern:

I, through my own personal experience, know that Mr. Claibourne Randolph Tatum, devoted a large portion of his time for a period of 5 years, starting with the year 1937, to public lecturing in which he instructed and admonished many hundreds of people to study and apply, to the best of their spiritual understanding, the fundamental principles of Christianity to all phases of human endeavor; and to accept the teachings of Christ Jesus as their guides to the practical realization of a righteously full and normal life.

I bear witness to the fact, that owing to Mr. Tatum's public teaching of the Christian Philosophy, as a practical medium for living a better life, he has helped me to better understand the teachings of Christ Jesus.

I also bear witness to the fact, that the entire cause of Christianity has been, and continues to be furthered in the lives and minds of men by virtue of Mr. Tatum's constant and vigorous public instruction based on Christ Jesus' message to humanity.

Mr. Tatum has always advocated strict obedience to the Constitution and the Bill of Rights of the United States of America, and all laws which are legally sanctioned by these greatest of national documents. Therefore, after carefully considering my first-hand knowledge of Mr. Tatum's public life as a teacher of Christianity, I willingly state, without any mental reservation whatsoever, that I regard Mr. Tatum to be a minister of the Christ Idea,

the gospel of the religion of the heart, which same is the full embodiment of the Ideas and Ideals of Christ Jesus' Golden Rule and the Sermon on the Mount.

I, Dr. Claude W. Emmons, do solemnly swear (or affirm) that I have read, and subscribe to all of the foregoing testimony, that I have personally inserted the numerals appearing in the places hereon designated for them, that I waive all of my rights pertaining only to Mr. Tatum's use of this affidavit, and grant to him full authority, and any and/or all persons that he may at any time select, to use this affidavit in whatever way he may desire in accordance with his own judgement, that I of my own freewill, undersign this affidavit to indicate that I declare each and every statement contained therein to be true to the best of my knowledge and belief.

(Testifier's Signature):

DR. CLAUDE W. EMMONS

(Address of Testifier):

820 Market St.
San Francisco

Subscribed and sworn to (or affirmed) before me this 12th day of Nov., 1942.

[Seal] HENRY B. LISTER

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires Feb. 2, 1946.

[Endorsed]: Filed 11-16-43.

DEFENDANT'S EXHIBIT D

Order #1165

Claibourne R. Tatum
954 Ashbury St.
(P.O. Box 4411)
San Francisco, California
March 25, 1943

To the Members of the Board of Appeal and all other persons authorized to determine a registrant's status under the Selective Service and Training Act of 1940.

Dear Sirs:

I will deliver this letter in person to my Hearing Officer, Mr. Hugh K. McKevitt, at the time of my scheduled hearing before him, to be included in my Selective Service file as additional evidence of the good faith in my claim and right to the deferment of a 4-D classification as provided in the Selective Service Regulations affecting a regular minister of religion.

Owing to my ignorance, which is publicly general, of the many and varied ramifications of the Selective Service and Training Act of 1940, I am left to assume that the occasion of my scheduled hearing before a Department of Justice Hearing Officer in regard to my claim as a conscientious objector may indicate that my claim for deferment on the ground of my being a regular minister of the Christian Religion is being regarded as a secondary issue, if regarded at all, by some of those vested with authority under the aforesaid Act to pass down decisions upon claims of a registrant under said Act.

I do, however, allow for the possibility of there being some policy, or routine of law which requires an investigation of conscientious objector claims prior to all others, but I have not been advised as to the truth of there being such a procedure; and must continue to believe that my claim as a regular minister is either being somewhat ignored or has been overlooked.

The seeming fact that my claim as a conscientious objector is taking precedence over my claim as a regular minister is exactly the opposite of what I intended at the time of my filing these claims, and is not what I desire now.

My claim as a conscientious objector primarily involves me personally; whereas, my claim as a regular minister involves not only me but my responsibility to many thousands of persons, and my fellow men in general, who depend upon me as a channel of Christian Principle expressed through the sermons which I am at this time drafting in the course of my studies of the major problems with which the human race is now faced. The former claim affects in a sense only me and my immediate family. The latter claim affects not only me and my family but the public as well, and in this light should, therefore, take priority over the former claim.

Stating it another way: I am not a minister because I am a conscientious objector; rather, I am a conscientious objector because I am a minister of Christ Jesus' Ideas and Ideals, which demand such a stand. It is to be expected in view of Christ

Jesus' teachings, that a Christian minister is at once, simultaneously, a minister and a conscientious objector to war. It is my opinion, which same is couched in Christian Principle, that any Christian minister who has not filed a conscientious objector's claim during the course of his affairs with the Selective Service System, either legitimately had no cause to seek such a deferment, or he is a hypocrite —a "whited sepulcher". In any instance should a Christian minister claim ignorance of Christian Principle as an excuse for his neglecting to take a conscientious objector's stand then he proves his lack of qualification to be considered a minister of Christian Principles of which, by his own admission, he knows little or nothing. Therefore, in my opinion, all Christian ministers, whether it is needful or not, should as a matter principle go on record as conscientious objectors to war; and it is in this spirit that I claim recognition as a conscientious objector to war in its being flagrantly anti-Christian and the most insidious condition standing opposed to mankind's full and free obedience of Christ Jesus' statement of the Laws of God.

A Christian Minister, as the name implies, is a servant of God. Christ Jesus served God through the people. His ministry was and is to serve God through the people, teaching them how they can live closer to God through their obeying His Laws. At no time did Christ Jesus and His disciples retire into a cloistered realm of their own to engage solely in their own personal developement and spiritual perfection in total disregard for the de-

velopement and spiritual perfection of the human race. To have done so would have been for them a renunciation of their privileged posts as servants of God. I should be perfectly clear, that a Christian minister, regardless of sect, denomination, or profession, needs must serve God through the people in order to serve God at all. In addition the teachings of Christ Jesus are not directed solely to those who understand them but to all mankind in order that man can be taught to undertsand God's way and precepts of Life.

I have centered upon the above points because internment in a conscientious objector's camp is, for a Christian minister, a serious obstacle virtually prohibiting his fulfillment of his obligation as a servant to God through mankind. Internment in a conscientious objector's camp deprives a Christian minister of his needful contact with the people through whom he serves God. And since the teachings of Christ Jesus are directed primarily to those who have not as yet seen the Light of Truth, the inmates of an objector's camp, necessarily being well versed in Christian Principle, are not those to whom the servants of God are primarily directed.—Such convinced persons need Christian ministry less than most. In addition, to give a Christian minister only the inmates of an objector's camp for his field of activity is in fact to impose, by laws contrary to the Constitution of the United States, the government's power to select at will where, how, when, and through whom a Christian minister will officiate in his capacity as a servant of God. As a matter of fact, for the government to impose a form

of incarceration upon any Christian because his religious training and belief do not fit his government's present plans is in itself a direct violation of Amendment I, of the Bill of Rights of the Constitution of the United States of America, wherein it is stated: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Certainly it is necessary for a Christian to be left free to choose when, where, how, and with whom he shall practice Christ Jesus' teachings;—and any governmentally-imposed condition which in any way restricts or alters the above also restricts and alters one's free exercise of his religious belief and his right to obey its dictates.

Webester defines exercise as follows:—"Act of exercising; a setting in action or practicing; use; habitual activity; occupation." The life of a Christian is "setting in action" the teachings of Christ Jesus. The life of a Christian is one of "Habitual activity" in accordance with the Laws of God. The life of a Christian is the "practice and use" of the Christian Philosophy. The life of a Christian is in his "occupation" in the "vineyard" of our Father. And how much more so is the above pertinent to a Christian minister!

The Christian ministry, or service to God through man, is my "habitual activity", my "occupation", and any law which prevents or prohibits "the free exercise thereof" is in violation of Christian and Constitutional Law as well as being socially unsound and immoral.

Upon one occasion I visited a prison camp of the San Quentin penitentiary, located on the Feather River in the Sierra Nevadas. I was struck with the freedom enjoyed by the prisoners. There were no guards in evidence, and no restrictions other than those of the camp limits and the general daily schedules. The men had their own moving picture house and other comforts. They moved about the grounds during work hours and leisure periods unattended and apparently content. At least those who shared some coffee with me seemed content and were very congenial. I could not help thinking of the many persons in world high finance and the munitions syndicates who are guilty of far more heinous crimes against society than these misguided but basically good fellows. Back to the point. I cannot imagine just how a conscientious objector's camp can differ very much from such a camp for felons of good behavior. Can it be that the acceptance of Christ Jesus' invitation to "Follow me" is a felony, or sufficient ground for the penalty of internment after the manner of treating felons? Is a Christian so dangerous?

In religious circles it is freely admitted that the primary cause of war and its related evils is due to man's refusal to accept Christ Jesus' teachings seriously and to apply them to the everyday walks of life. Religious men, and others, now agree that mankind must begin learning how to incorporate Christian Principle in their governmental, economic, and social life in order that the shameful inequalities and brutalities now extant may be de-

stroyed for all time—never to again blight the future generations of this civilization.

It is to be assumed that the American people are fighting the most heartbreaking war in all history in an effort to rid themselves of the evils that promote war. The people regard war as a monstrous evil and are fighting only to attain peace with all of its many blessings and necessary virtues. But what guarantee can they be given that peace will be in any way secure after it is gained? Only they themselves in their changed mays of living with each other can guarantee the lasting qualities of a peace which depends upon mankind's intelligent prosecution of life's varied phases in a world that has shrunk to almost provincial size in the last decade. I say, "intelligent prosecution of life's varied phases" advisedly, because only by following the pattern of the One Source of True Intelligence—God—can mankind be successful in eliminating the cause of all man-made suffering. Since mankind have proved their ignorance of True Intelligence as revealed by Christ Jesus, by permitting war to occur, it remains for those who are the servants of Divine Intelligence to serve God through man by helping to dispell man's ignorance of Principles which will assure lasting peace when they are applied with intelligence. This is the Christian ministry the whole world over. . . . And the world was never so sorely in need of it as now. This in my ministry . . . and it has never been more important and necessary to me and mankind at any time before.

My stand as a conscientious objector to war is only incidental to my religious beliefs and ministerial profession. I am conscientiously opposed to war because Christ Jesus taught that, "He who lives by the sword shall die by the sword." He endorsed the commandment "Thou Shalt Not Kill". But these are not the whole of His message to humanity. His ministry has even more to do with pointing the way to greater happiness and prosperity for mankind. His admonishments against violence were given only because, before man can see the Light of Truth to guide his footsteps toward a practical demonstration of real Brotherhood, he must first discard his false concepts and habits which prevent his even suspecting the existence of the Truth.

After man has first learned what he "Shall Not" do, it is even more important for him to learn what he "Shall Do". Just so is my share in the ministry of Christ Jesus' teachings of what men "shall do", of greater importance than my conscientious objection to war, which is but a symbol of one facet of what man "shall not do"—that he "Shalt Not Kill".

Therefore, I repeat, to continue with the investigation of my claim as a conscientious objector, without regard to the prior nature of my claim for deferment to class 4-D, as a regular minister, is a distinct error and miscarriage of authority on the part of those who, either out of ignorance of the facts in the case, or disinterest, have neglected to route my claims to the proper departments of the

Selective Service System, the Department of Justice, or other directly related government agencies established for the purpose of giving official recognition to registrants who are regular ministers.

If, by any chance, those who weigh such matters as the validity of one's claim to consideration as a regular minister, are in some doubt as to the validity of my status, I beg to point out that I am now engaged in preparing the material for a series of sermons to be released in the near future. This, may I say, parallels in comparison only the preparatory work of a minister who drafts a series of sermons for a radio program. Such a minister does not have any parish or followers prior to his program, nor does he know the number or names of all who will comprise his audience after his program is in the process of release. My position is similar in that I do not know the number or the names of all the persons I will reach with my present and future work. I can, however, point to many of those to whom I have ministered in the past; and I have filed affidavits signed by a few of the many hundreds of people who would testify in a like manner were such action necessary.

In closing let me say, that my claim for recognition as a conscientious objector has not been influenced in any way either by my part or present interest in the movement known as "Mankind United". Though, as it regards my claim for deferment as a regular minister, "Mankind United" has afforded me an opportunity to broaden my influence with the public, and constitutes a ready

vehicle for my efforts in behalf of mankind and God—both of whom I serve in the name and teachings of Christ Jesus.

It seems to me that my case should never have reached the hands of the Hearing Officer, Mr. McKevitt, since it is concerned primarily with my claim for a 4-D classification, which I understood was made quite clear by my appeal adviser Mr. Pratt.

Please do not construe this letter as a withdrawal of my claim as a conscientious objector—it most certainely is not. Rather, it is a protest against what I am left to believe is a possible disregard of my claim for a 4-D classification. I must persist in drawing attention to the fact that I am fully qualified for a 4-D classification; and that all consideration should by right be given to it first, else action may be taken in accordance with the Selective Service law which would violate my Constitutional right to worship God in the manner I deem right, and prevent the free exercise of my Constitutional privelege to do so.

Sincerely,

CLAIBOURNE RANDOLPH TATUM

Claibourne Randolph Tatum

. . . . #1165

[Endorsed]: Filed 11-15-43.

DEFENDANT'S EXHIBIT E

Order No. 1165

Claibourne R. Tatum
954—Ashbury Street
San Francisco, California
December, 13, 1942

Mr. Orville C. Pratt, Jr.
Appeal Advisor
1818—California Street
San Francisco, California

Dear Mr. Pratt:

During the time of my appointed interview with you, I read that section of the Selective Service Act which describes the qualifications for a 4-D classification. In the section refered to, it states, that a regular minister of a religious organization is eligible for a 4-D rating—I believe that I am eligible for this.

Since 1936, I have been identified with the Pacific Coast Division of the International Registration Bureau, which is more generally known as "Mankind United". I digress for a moment to mention that many erroneous news accounts of this movement's various activities have appeared in the local press. These articles based on supposed, distorted, and partial truths and information have lead to many carelessly formed public opinions regarding the motives and aims of the organization. Actually, through my long association with the movement I have had first-hand experience which I know to have been subjected to public distortion. The integrity

and sincerity of the movement has frequently been proved to be above reproach, through court action of city, state, and nation. I mention this to forestall any justifiable prejudice caused by unthinkingly flippant journalism.

The stated purpose of the Pacific Coast Division is: "To end illiteracy, poverty, and war, and to bring the assurance of lasting peace and guaranteed security to the people of every nation." Whether or not this ambitious objective will be reached does not seem to be of prime importance here. However, the achievement of this goal is dependent upon the willingness of a sufficient number of people to put the fundamental factors of Christ Jesus' teachings into practical use. In this respect the movement does not differ from those religious organizations which depend upon Christian people to support those functions which are to lead them in the Way of Christ Jesus.

The organization "Mankind United" advocates only those methods, for accomplishing its objectives, that are founded in Christ-Principle. The organization bases its entire activity on the teachings of Christ Jesus, believing that only through the acceptance and use of the Truths He revealed, can we lay the foundation for the physical manifestation of the spiritual "Kingdom" that He said is not afar off, but at hand, to be established here "on earth as it is in Heaven"—which He said is within us. Christ Jesus' whole mission is for the purpose of helping mankind start a new life in brotherly equality and service to each other.

The practicability of this ideal, and the work to realize it, is quite likely not of importance here, so I will not discuss it. But the fact that "Mankind United" is concerned exclusively with the Christian philosophy, and strictly complies in word and deed with its cardinal principles, is I believe, noteworthy in considering it a religious organization. I say this notwithstanding that "Mankind United" does not concern itself with the differences of the various churches, but seeks to embrace the truth contained in each; and is on record as stating, that it is a non-racial, non-political, non-sectarian, and non-religious organization. It is my belief that the latter-mentioned qualification is emphasized because most people regard a religious organization as embracing only one sect that is separate from all others because of a special Scriptural interpretation. Such a concept of this movement would severely impair its influence among the people of varying creeds and faiths. In addition, were it to inaugurate a new set of sectarian rites, dogmas, and formalities it would at once defeat its very purpose—the binding together of all Christians, regardless of religious differences of opinion, into a common movement for the united Christian action in behalf of the belief they profess to love.

I beg you to bear with me while I seem to split hairs, for the topic under consideration seems to require a few definitions. Please permit me to cite the Latin root of the word religion . . . it being religio—(re) again, (lego) gather—some define the

root as meaning to re-bind. Hence, any group which re-unites the people in Godly activities, is gathering them together again—is religious. I cite this because it is the major, I should say, the sole purpose of "Mankind United", as its name implies, to "again-gather" all Christians, irrespective of their church affiliations, into one body of men and women pledged in a solemn pact for mutual aid and co-operative enterprise based on Christ Jesus' teachings. Since it is the common gathering place for all religions I believe it to be a religious organization in the essence of the term.

Webster defines religion as follows: "The service and adoration of God or a god as expressed in forms of worship." Adoration implies worship, worship implies homage, and homage implies service. Service reuires and act; and the teachings of Christ Jesus quite definitely state that only a man's works prove his faith in the God he adores—acts only, prove the desire to serve one's God. Thus, the extent of one's Christian service to his fellow-men is the one true measure of the degree of one's adoration of God; and works are the only suitable forms of worship. Jesus constantly refeted to a man's works as being the only proof of his faith in God; that Christian works are the only acceptable forms of worship, for "faith without works is dead".

Most people lose sight of the fact that Jesus coupled mental force with physical action—he did things of quite a physical nature that are to leave their impress upon all future ages. Much of the misunderstanding of "Mankind United" arises from

the fact that it takes Christ Jesus' example so seriously as to follow this example.

Christ Jesus regarded all forms of intolerance, injustice, and inequality as being un-Godly, and against the Principles upon which He based his every thought and act. Christ Jesus did not set aside any phases or endeavors of human existence as being immune to, or beyond the Christian responsibility of conforming to the Laws of God which He revealed. Therefore, "Mankind United" is not only justified in regarding all things that are in contravention with His teachings as being anti-Christian, but that man must be helped to become independent of these things, or conditions before he can put aside and be free of the negations which have for centuries prevented him from accepting the invitation to "Follow Me".

"Mankind United" is following the example and leadership, the Ideas and Ideals of Christ Jesus by calling all Christians to join one another and follow Him; to act as well as pray; to make prayer and action synonymous; to follow the Great Exemplar who prayed through action. To act in behalf of His Ideals and Ideas means to defend them from anti-Christ.

The point I wish to make is, since man's mental and physical life are so closely allied it naturally follows that those things, or factors which retard his progress physically, affect him to a like degree mentally. The apostle Paul proves this when he says, "The love of money is the root of all evil". Since it is not money, but the love of it which is the

root of all evil, then the root or cause must be the system by which it is made useful; and we know that the system of Paul's time has remained the same in basic principle to the present day. Then, it is the system which causes man to devote most of his life to its support and aggrandizment; to profess his love of this source of all evil through such "devotion" or worship. Then, "Mankind United", having a practical plan, is justified in taking human footsteps to remove this cause of all suffering.—Not to remove money from life, but the factors in its use which literally force men to love it.

"No man can serve two masters", consequently mankind must be freed of servitude to the "evil root" of an economic system, which perforce one must now serve or starve, before they shall be able to serve God as their one and only master. The foregoing is the crux of that which motivates "Mankind United" action; it has a plan which takes into consideration the fact that man cannot divorce his spiritual life from the physical one which is controlled by his economic status—his spiritual freedom to practically apply Christ-Principle hinges on his changing the economic system of greed, selfishness, and brutality to one of co-operative, Christian design and application. The subject is too vast to treat with any degree of fairness to the movement, here.

All works which have as their net results, the furtherance of Christianity are Christian works. All such acts are faith-worship of God; and when people are gathered together to perform these acts in unison they are gathered together in His name. If they

divide, and at some later date rejoin they are regathered; and this regathering constitutes a religious move. In this sense, "Mankind United" is a religious movement. . . . It functions as the common ground upon which all religious people, desiring to obey Universal Principle, may meet and be bound together to travel in the footsteps of Him who taught the one Truth, the one way to becoming worthy of being the children of the one God.

"Mankind United" is a non-profit organization operating solely in behalf of the public welfare.—Its cornerstone is the philosophy of Christ Jesus; its law, the "Golden Rule and the Sermon on the Mount"; it motives, methods, and goal are of the highest of Christian concepts; its personnel, those who love all that Christianity represents enough to act in support of it.

"Mankind United", requires no initiation fee, dues, or assessments. Hence, it has no membership in the legal sense,—one can only register for the receipt of its 30-Day Program. Therefore, I could not record my association with it on those Selective Service forms which I can at this moment recall, since they ask for information regarding membership rather than just association. Were I to have refered to myself as a member I would have given false testimony. The fact that my convictions regarding matters of world import were already clearly established prior to my ever hearing of "Mankind United", and that the movement has not altered those convictions, constrained me to disre-

gard any mention of my association with it—holding it to be aside from my personal stand at this time. However, in this instance it is well to mention that for many years I represented "Mankind United" as an official lecturer and teacher, or regular minister. Record to verify this should be readily available in the files of some branch of the Federal Bureau of Investigation, which I understand keeps dossiers on all persons prominently connected with all organizations regardless of kind. A little over a year ago I temporarily withdrew from the public platform of "Mankind United" in order to avert an inclination on the public's part to place too much stress upon my personality. I still retain my status in the movement, but I now devote my study periods to reviews of war developments and subsequent events. I feel that such study is necessary for me to correlate world conditions and their effects on man's mental and physical life, so that I shall be adequately prepared, with an intelligent background of research, to meet the mental and physical needs of people whose lives are being deeply affected by their experiences.

So you see, Mr. Pratt, that in a very special but real sense the Pacific Coast Division of the International Registration Bureau is a religious organization concerned with deeply religious but practical affairs; and that I can consider myself a regular minister of its Christian work to the public.

I realize that the foregoing information is a bit tardy but it did not seem necessary to go into these details until I read the law governing the 4-D classi-

fication. So, please annex this letter to the memorandum you have prepared to submit to the Board of Appeal.

Thanking you in advance for your courtesy and consideration,

I am sincerely yours,
CLAIBOURNE R. TATUM

[Endorsed]: Filed 11-15-43.

DEFENDANT'S EXHIBIT G
FOR IDENTIFICATION

(Copy)
National Headquarters
Selective Service System
21st Street and C Street, N.W.
Washington, D.C.

March 5, 1942

Mr. James Rowe, Jr.,
The Assistant to the Attorney General,
Department of Justice,
Washington, D.C.

Subject: Conscientious Objectors

Dear Mr. Rowe,

I have your letter of February 25, 1942, transmitting a copy of a letter dated February 24, 1942, from Lamar Hardy, hearing Officer for conscientious objector cases in the Southern and Eastern District of New York, to Mr. Collins.

I note that Mr. Hardy has experienced consider-

able difficulty in several conscientious objector appeal cases in determining whether the conscientious objection of the registrant is based upon "religious training and belief." I also note that you are circulating among all hearing officers copies of decisions in all presidential appeal cases involving conscientious objectors.

It is my feeling that each case must be considered individually and that no presidential appeal decision can be considered as a binding precedent. In each case I must be satisfied that the objection is based on "religious training and belief" which contemplates recognition of some source of all existence which, whatever the type of conception, is Divine because it is the Source of all things. Religious belief, however, is more Important than "training" because we are too prone to have the schoolmaster in mind and hours, days, weeks, years of study when we weigh the meaning of training. Even there, one gets it by the long processes—another by "cramming". Does he get it? That's the question. If so, it involved training of some kind. I have some doubt about absorption through "bolts from the blue" even though I do not toss aside entirely S. Paul's experience on the Road to Damascus. These are the exceptions and probably he had a lifetime of training crammed into that one hour. Somewhere I think the record will tell the story satisfactorily in the given case whether it is in the form of long-drawn-out processes of schoolmaster training or otherwise. Whichever it is the weight of the evi-

dence is strengthened of diminished in consideration of all the facts.

I hope that the decisions in presidential appeals from now on will more than fully reflect our views on these important problems.

Sincerely yours,
LEWIS B. HERSHEY, Director

This copy mimeographed by:
Northern California Service Board
for Conscientious Objectors
2151 Vine St., Berkeley, Calif.
Telephone: BE. 3745

DEFENDANT'S EXHIBIT H

Claibourne Randolph Tatum,
954 Ashbury Street,
San Francisco, California
June 26, 1943

Colonel K. H. Leitch,
Selective Service State Headquarters,
Plaza Building,
Sacramento, California

Dear Sir:

Being unfamiliar with the etiquette and formal courtesies due an officer of your rank, I am obliged simply to beg your personal attention throughout the following matter. Such consideration on your part is of utmost importance to me.

Though, for your convenience, I am enclosing a

Defendant's Exhibit H—(Continued)

copy of my Selective Service case history, I feel that it will conserve your time for me first to mention briefly the high lights of my dealings with my local board. I filled out a questionnaire during the first sign-up prior to the Pearl Harbor attack. At that time I was classified 3-A. Later my case was reopened and I was reclassified to 1-A. I appealed this decision to my local board and was reclassified 3-A-2. Later on I was placed in 1-A-O owing to my claim as a conscientious objector. I appealed this decision to the San Francisco Appeal Board on the basis of my claim for a 4-D classification as a regular minister of religion as well as a conscientious objector. Notwithstanding ample evidence to support both phases of my claim, the Appeal Board has denied it by a vote of three-to-nothing, thereby causing my reclassification to 1-A in spite of the evidence at hand which is against such a rating.

I must protest against what seems to be the waiving of irrefutable testimony, and the subsequent 1-A classification that I have been given. According to information accompanying the notice I received I cannot appeal to the President;—therefore, it is necessary to direct my protest, and state my case, to you . . . qualifying this protest as follows:

No court can presume to tell a man what the state of his conscience should be; unless, perhaps, his conscience is dormant. Mine is not! I am a conscientious objector to war and no court can disprove this fact. It can only determine what It thinks I think. And this, only according to my capacity to express

Defendant's Exhibit H—(Continued)

my convictions plus Its capacity to interpret that expression. To this end, I have corresponded at considerable length with Selective Service officials in an effort to clarify my stand and the convictions upon which it is based. That correspondence accompanies this letter. Since, however, that which I have written to date would seem to have been treated as inadequate, I must restate that the convictions which influence my conscience will not permit me to engage in war in any form, nor to facilitate the efforts of others in the taking of human life. As you can readily see I would be a liability in the armed forces.

Many in the administrative and judicial branches of this land refuse to recognize the Congressional revelations regarding the collusion of the money and munitions interests during World War I, and prefer to say in effect, "Don't bring that up, let's get on with the war."

Army engineers, building a bridge, would be judged incompetent and dangerous were they to refuse to recognize proven faults in the design and construction of that bridge, and were to say, "Don't bring that up. Forget it, and let's get on with the bridge." A fault in any premise leads to a fault in its conclusion. Therefore, from a standpoint of constructive principle, war is ethically and morally wrong, and is to all practical intents and purposes a monumental fraud. With its inclusion in the social scheme of things only social illness can issue.

Defendant's Exhibit H—(Continued)

It would be utterly impossible for me to subordinate my convictions regarding war, and to take any part in furthering any war effort. I would not only be subject to almost immediate court-martial, but in addition, from the army's standpoint, I would be a demoralizing influence among those men with whom I would come in contact since my conscience impels me to speak my mind in regard to war.

Since adolescence, my convictions regarding war have remained unchanged. I deplore murder, particularly the cold, premeditated, "legalized" killing called war. I can never support war in any form without turning traitor to God and myself, and this I will never do willingly. With its high code of discipline, the army should not want a man whose religious convictions would force him to insubordination; nor should it want a soldier without the courage of his convictions—a moral coward. Being a fighter, certainly you have no respect for, in fact must despise, cowards and traitors. I fully share those sentiments. It is because of this that I cannot turn traitor to, compromise with my understanding of Christian Principle, and must fight for my right to apply it. Certainly you will agree that no man is worthy if he will not pay the price to obtain what he believes in his heart to be right.

Whether this is philosophy or not, actually we know exceedingly little about the Forces which control our lives . . . why we are here, where we come from, and where we are going. Though we do know of the Divine Laws, knowledge of which has been

Defendant's Exhibit H—(Continued)

handed down to us, we have no conception of what our violation of them brings upon our heads. That life is a continuous thread we are certain. But to what extent we disrupt and retard its progress for ourselves and others when we disobey Divine Law, we have no conception. It is quite possible that with each murder we commit we retard our Life-progress countless thousands of years, and must travel up the whole tortuous trail all over again to reach the breaking-off place in one life. Also, what do we cause other beings to undergo after we kill them? After all, there must be a good reason why murder is outlawed by Divine Command—and war is murder regardless of how it is looked at. Were I to submit to entering the armed forces and obey the superior officers, I would be forced to disobey Christ Jesus, my only acknowledged Superior Officer. Such a Superior cannot be denied with impunity.

We only know that we are alive, and that the highest code by which to live justly, sanely, and constructively has been voiced by the greatest of all teachers, Christ Jesus. Of all mandates, laws, or codes none are as worthy of credence as His... and of my own free will I choose to comply with man-made law only insofar as it is compatible with His Law.

This is not a question of my loyalty to one country or another. I would be impelled to take the same course regardless of the dictates of any country, or any excuse that the officers of any nation could conjure up as a justification for war.

Defendant's Exhibit H—(Continued)

I am opposed to the Communism of Russia, the Naziism of Germany, and the Fascism of Italy, Spain, and Japan. I condone the philosophy and acts of none of these, and am not in sympathy with dictatorship or the attempt to establish dictatorship in any way, let alone by deceit and hypocrisy under the shield of democracy.

Insofar as my patriotism is concerned, I have always lived with a deep and abiding love for our country. The history of my family is woven deep into the fabric of the history of this continent since the early 1620's. I have the tradition of the important role of statesmanship that members of my family have played in the formation of our nation always to inspire the highest kind of patriotism within me. But this patriotism, like our nation, is unswervingly grounded on those Christian Principles which not only declare the Divine Equality of man and his inalienable God-given Rights, but which must be followed and minutely obeyed if this nation and humanity are to survive.

By virtue of my family heritage and Divine free-agency I do not owe allegiance to any government, under whatever name it may go, that is not honestly adhering to the Principles of Life taught by Christ Jesus, and the principles set forth in the Constitution of the United States and its Bill of Rights. My allegiance is to our Creator, His Laws, and His Divine Lieutenant; and only to man's government as far as it expresses in practice an adherence to those Laws.

Defendant's Exhibit H—(Continued)

Not manifesting any lack of true patriotism, I choose to follow the leadership of princi*ples* which give substance to the backbone of humanity, rather than to follow the leadership of princi*pals* who could break that backbone. Human leadership on our home front has permitted an awful muddle to develop. Private industry and public freedom are being destroyed through national mismanagement. Every day there is some new evidence of the criminal waste and inefficiency of human leaders. Strikes and riots make mock of national unity—giving aid and comfort to totalitarian propaganda machines. Is it any wonder that the people are now looking for leadership of stability? Human leadership has led the world to war. Is it any wonder that I choose to listen to the greatest Mind that has ever visited the world when He says that He is the Way, and can be followed only in Goodness? His teachings are tantamount to a command; and this command takes priority over all others by virtue of seniority and eternal significance. As a Christian, I will obey only His Command. . . . As a Christion minister, I will teach it everywhere I go.

I do not state the above in defiance of our nation's laws. No law that is set upon the Christian foundations of this nation need be defied in order for one to remain true to his Creator. However, the human mind is fallible, and being so, is prone to make mistakes. In my case a mistake has been made, and this letter constitutes my effort to pro-

Defendant's Exhibit H—(Continued)

vide you with enough information to enable you to correct it.

If it is true that this war is being fought to establish their right of man to live under the four or five freedoms, including the right to a Freedom of Conscience, then the vested authorities should prove their sincerity by honoring a man's conscience. If they cannot do this, then all the prevailing propaganda leading people to believe that such freedom is the national goal, should be withdrawn—and the truth told instead.

Gasoline is no substitute for water in fighting fire. Conversely, water is no substitute for gasoline in propelling a fire engine to the scene of a fire.

If a nation becomes so spiritually impoverished as to be devoid of usable knowledge of Christian Principle, for the harmonious and efficient conduct of its affairs, it will find war no substitute for Christian Principles.

The Truths Christ Jesus taught mankind are the instruments of Life, of Economic Security, of a Prosperous and Constructive Peace, and of Human Progress and Democracy. War is an instrument of death and destruction, and is antagonistic in every aspect to the Principles Christ Jesus came to show us how to apply in our daily living.

Our refusal to apply these Principles either as individuals or as nations does not make them less potent and True—it only makes us the greater fools! We cannot serve God and mammon. I cannot serve both God and war. War is activated

Defendant's Exhibit H—(Continued)

hate—the opposite of Christianity, which is activated Love. Were I to be forced into the armed forces I would either have to be a liability to those in charge, or learn to "love" war and to hate the teachings of Christ Jesus. (For when one knows His teachings, he must first learn to hate them before he can disobey them.) I do not relish the former, and will not do the latter. This being the case, I am forced by unalterable Principle to refuse induction into the armed forces of any nation. As you can plainly see, if my legitimate request for dispassionate consideration as a regular minister—conscientious objector is refused I would be inhumanly and unjustly forced to provoke my own arrest and prison sentence.

One military leader has been quoted as saying, "The trouble with you church people is that you are not willing to back up your theories with your life, or even with your property. When one of us military men believes in war he is willing to go to war and be shot at. This you church people are not willing to do. Therein lies your weakness. Whenever you are willing to pay the price of putting your principles into effect, then we military men will be obliged to retire. Our strength is due to your weakness."

I for one believe it is high time we Christians begin to act seriously, in spite of danger, to back up our words with deeds.

Quoting another military leader, he says, "It is

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the business of you church people (Christians) to make my business impossible."

By the words of your own colleague in arms, it is the BUSINESS of all Christians to conscientiously oppose war. I have chosen to accept the well-meant and pithy challenges of those leaders. I do not by myself expect to be able to end the occasion for war. But, among others, I shall take my stand as at least one more person who has become an articulate Christian.

When enough Christians become articulate, you gentlemen of the military profession shall no longer have to practice the military "art". . . . But that does not imply that your talents, and genius for organization and planning need go unused. It means instead that your talents shall become available for constructive use to end human ignorance and suffering and promote human progress and Life rather than death.

I am loyal to this nation (my country). I believe in its fundamental principles of government, and am willing to fight for them, albeit, though not with weapons of war—for they are at variance with those principles, and, in this age of progress and invention, need not be resorted to for the defense of Right.

I would be a traitor in my own and the eyes of all True Christians if I took up arms against my fellow men. The military machine is not a democratic institution, and democracy is neither protected nor exercised by warfare. The only reason

Defendant's Exhibit H—(Continued)

why the world is at war today is in its failure to live truly according to Democratic and Christian Principles. And it must be stressed, that Professions of Faith are no Substitute for Practice of Faith.

The principles of war are not the Principles of Peace. War can only be successfully prosecuted when those who comprise the fighting forces on each side have been persuaded to believe the opponent is truly an enemy to their own interests and welfare, and have thereby been brought to hate that enemy enough to deem it necessary to kill him. I cannot see people as being our enemy, but see instead certain ideologies and evil principles as being the common enemy of all mankind. This is a contest between God and evil. Christ-Principles of Life on one side and the war-principles of death and destruction on the other. I prefer to champion Christ Principle.

Now, the tank, airplane, and battleship designers, your engineers, know that all these and other weapons of war will function only when operating in harmony with the principles upon which they were each specifically designed. Why then is not the same sound, scientific basis of the Principles of Peace insisted upon when, in the human element, we seek to adjust our lives to a scheme of things that depend upon Universal Laws and not upon man-made law?

Hate can never produce international understanding . . . and the Peace we all want is wholly

Defendant's Exhibit H—(Continued)

dependent upon such an understanding. The Peace of mutual, international understanding is what we in our separate ways are supposed to be fighting for. It is, therefore, primarily a question of method; and at no time did Christ Jesus advise the use of violence to achieve an understanding between adversaries.

If Peace is what the world wants, then the Principles of Peace must be adhered to. If our leaders are not striving for Peace, security, and amicable international relations, then the much-publicized Four Freedoms, and all other idealism held out for public support, are just so much deception—and the people should be told the truth.

That I have labored diligently for the world-wide establishment of the Four Freedoms is evidenced by my long association with "Mankind United", which is public knowledge. If my association with "Mankind United" is being held against me, both the organization and I are being deeply wronged. The recent decision against twelve "Mankind United" co-workers was a decision that in no way condemned the Principles of the organization. It was purely a judgement of a jury that was, in so many words, instructed to weigh the acts of individuals and not the Principles which motivated them. The judge made it very clear that only people, and not the Principles of "Mankind United", were on trial; and that case against these people is loosely hung on misinterpreted words that were separated from context to form a case. The whole

Defendant's Exhibit H—(Continued)

matter is still being contested, and an appeal has been lodged with the United States Circuit Court of Appeals.

Since no one dares to attempt to disparage the ideas and ideals of "Mankind United", these should endorse my ministerial claim in the eyes of Selective Service officials. At no time has there been any question as to the high purpose and idealism of the organization; and I am proud to be able to say that I have acted in the capacity of a rgular minister to the people in behalf of the Christ-Principles which it promulgates. The record of my service to God I have acted in the capacity of a regular minister to undeniable. In addition, I secured a few affidavits (copies included herewith), to further substantiate my claim that the public I have served shares this conviction.

As regards my being a conscientious objector, several unbiased members of my family, together with some of my friends have testified to F. B. I. agents that I am absolutely sincere in my convictions, and that I held them long before war was considered a possibility; in fact, long before I ever heard of "Mankind United."

That, in spite of such honest evidence, I have been denied a 4-D classification, or even a 4-E rating, can only mean that this evidence that has been given by everyone in good faith has been unjustly ignored. If I, and others like me, are to be crucified because we love the teachings of Christ Jesus enough to remain faithful to them at all costs,

Defendant's Exhibit H—(Continued)

then that crucifixion shall be caused by the small-mindedness and bigotry of either uninformed or misinformed people, in places of importance to the American people, who seem unable to discriminate between the true and the false testimony that comes before them.

I realize that in a world so dominated by personalities it seems incredible that there are still some who prefer to follow the leadership of Right-Principles instead of men. Even in "Mankind United" we do not follow men, for no man is indispensible or infallible. Realizing this, we follow only the Principles taught by Christ Jesus, depending only upon men to the extent of needing their co-operation for the orderly performance of our duties to our Father through the observance of His Laws. Christ Jesus' teachings are so simple to understand, that were anyone who is depended upon to aid us in taking the human footsteps on His way, to violate His Law such an error would be immediately obvious and we would cease to rely upon that person for aid;—but we would never cease to depend upon the Principles of Good which are our only source of guidance. Our founding fathers fully appreciated the value of this kind of leadership when they charted the course of this nation.

Though man should falter, Christ-Principle moves steadily on, shaping our common destiny. "Mankind United" is pre-eminently a modus operandi for Christ Principle, and all who follow the leadership of the cardinal Principles it advocates, are

Defendant's Exhibit H—(Continued)

working to fulfill our Creator's Plan for mankind which is governed by those Principals. No religious movement can provide the people with more than this. . . . And none can provide less and remain truly Christian.

I have gone to considerable length elsewhere, to explain what I mean when I say that my church is the Church of the Heart. Christ Jesus recognized no church other than that of a pure heart filled with Love of God expressed through the constantly-active Love of all living things. (Slaughter is not an expression of Love.) This inner church, the only one ordained by the life and acts of Christ Jesus, being good enough for Him, is certainly good enough for the rest of mankind to aspire to be worthy of. It being the only one He endorsed, it is the only church in which Christians can learn to follow and apply His teachings. The Church of the Heart is not a building, but is a quality of heartfelt thought. All of my life I have sought a greater understanding of this inner Church; and, through "Mankind United", I have endeavored to lead others to a greater understanding of their inner responsibility to themselves and mankind in that they must build within their own hearts such an understanding love of Christ Jesus' teachings that they too will make their hearts a fit home for the Goodness of the Spirit of our Creator. Such a fit home—a clear concept of God—is the only Church in which Christians may worship our Father intelligently; and one's heart must wholly become this

Defendant's Exhibit H—(Continued)

Church before one can become a wholehearted Christian.

I have unreservedly taught the fundamental Principles of Christ Jesus' Philosophy publicly for many years. Records will prove that this action has not been fitful, but that it has been orderly and constant. If "fight" is the word, I have never ceased to fight for the universal establishment of His teachings in deeds as well as words. My part in this fight has always been forthright, has long been in the capacity of a regular minister, therefore it is only proper that I should be regarded as such and be given a 4-D classification.

There may have been some confusion over my claiming exemption both on the basis of my being a conscientious objector and a Christian regular minister. In my opinion, measured by Christian Truth, a Christian minister must of necessity support the Christian Principles of Peace and Brotherhood by his conscientious objection to warfare.

No one respects a man who does not have the courage to support his own convictions. To me, courage is not the absence of fear, but the carrying on in spite of fear. I believe all normal soldiers fear conflict, and I fear war as much as does any normal person. However, I should fear prison, and the resultant adverse family and public opinion, far more than a hero's death on a battlefield. Yet, definitely without any longing for martyrdom, I shall try to manifest sufficient courage to stand firm by my beliefs through whatever experience my

Defendant's Exhibit H—(Continued)

sense of integrity and constancy of Christian purpose shall take me. A man who is not loyal to his own beliefs cannot be loyal to anyone.

Either by being court-martialed, or imprisoned for draft evasion, I would be denied an opportunity to continue my ministerial work in which I can help to further an understanding of the basic ideals of America, and help that understanding to flower into a practical demonstration and working plan based upon those Principles of Spiritual and social government that we all intend to see firmly blended in the lives of mankind after the war is over. To imprison me would not add a man to the armed forces, but would only stifle one more voice raised in the cause of Freedom.

I do not relish the idea of going to prison—I have pride, ambition, and a keen sense of the daily duties freedom permits me to perform. However, selfish reasons aside, I feel an even greater responsibility to my fellow men, and the good that I flatter myself I can do for them. Because of this latter reason, the thought of being penned up in prison is very unpleasant to say the least. Yet, I am quite willing to go to prison if, because of my desire to remain steadfast in my concept of Christian Principle, I am forced to such an end. In the totalitarian nations I would consider such treatment the natural course of events to expect from officials who hold no respect for things Christian. But, here in America, such an official attitude would be appalling and odious in the extreme, and entirely unexpected.

Defendant's Exhibit H—(Continued)

It is difficult to believe that such an attitude prevails in officialdom here. Any miscarriage of justice such as a prison sentence offered as a reward for maintaining one's religious convictions would have to be due to a mistake on the part of those lacking a thorough Christian education. It is to forestall such an all-too-possible error—such a colossal tragedy in my life—that I appeal to you to assert your official influence in my behalf.

I do not ask this as a favor of you.—To a man of your standing and position of trust any asking of favors would be most insulting. To me, with the natural pride and spirit of all true Americans and sincere Christians, fawning for special privilege, and special privilege itself, is held in contempt. I will not beg, but I plead with you as one member of our human family to another, before God, and with respect for your responsibilities, that you review my case with an open mind, taking time to seek out and weigh the respective merits of evidence that is uncolored by any but a healthy Christian prejudice. I do not deny my bias, but it is sincere, it is true, and it is vouched for by sincere and true American citizens who do not enpoy the possible reflection cast upon the truth of their testimony by the Appeal Board's recent decision.

The subject of a man's conscience—its innermost workings—is vast, having innumerable ramifications and their attendant thousands of nuances of thought and motive. All of this considered, I believe that I have been as brief as it is possible and still throw

Defendant's Exhibit H—(Continued)

some light upon my heartfelt feelings. I have endeavored to display the rough outline of my conscience, and now rest my case in your hands to be dealt with according to the frank dictates of your conscience.

Yours very truly,

.....

(Clairbourne Randolph Tatum . . . . . Order #1165.)

P. S.

To further facilitate your action, I am mailing a copy of this letter and the accompanying case history to General Lewis B. Hershey.

(Return Card Receipt No. 48912 for Registered Article attached to above typewritten article.)

[Endorsed]: Filed 11-16-43.

DEFENDANT'S EXHIBIT I

State of California
Director of Selective Service
Plaza Building, Sacramento
July 1, 1943

In replying refer to subject below:

Claibourne Randolph Tatum
954 Ashbury Street
San Francisco, California

Subject: Claibourne Randolph Tatum, 9f-44

Dear Sir:

Receipt is acknowledge of your communication

and enclosure of June 26, 1943 in which you request that this headquarters appeal to the President on your behalf.

While your case was on appeal, your file was reviewed by this headquarters and it was our conclusion that a Presidential Appeal was not then warranted.

The statements made in your communication and enclosures have been carefully examined. It is the opinion of this headquarters that intervention by this headquarters in your case is not warranted at this time, and that the position formerly taken by us should not be changed.

Very truly yours,
K. H. LEITCH
K. H. Leitch
State Director of
Selective Service

[Endorsed]: Filed 11-16-43.

DEFENDANT'S EXHIBIT J
State of California
Director of Selective Serfice
Plaza Building, Sacramento
July 21, 1943

In replying refer to subject below:

Claibourne Randolph Tatum
954 Ashbury Street
San Francisco, California

Subject: Clairbourne Randolph Tatum, 9a-44

Dear Sir:

Your letter of July 16, 1943, has been received and its contents noted.

We have carefully reviewed the statements made in your communication but they fail to indicate that this office should change the position taken in our letter of July 1, 1943, addressed to you.

Very truly yours,
K. H. LEITCH
K. H. Leitch
State Director of
Selective Service

[Endorsed]: Filed 11-16-43.

DEFENDANT'S EXHIBIT K

Clairbourne R. Tatum
954—Ashbury Street
San Francisco, California
July 16, 1943

Colonel K. H. Leitch
Selective Service State Headquarters
Plaza Building
Sacramento, California

RE: Case of Clairbourne R. Tatum, #1165

Dear Sir:

After my having seen the report to the Appeal Board by Mr. McKevitt, Hearing Officer, I no longer wonder that your headquarters considered action by it in my behalf unwarranted at the time of your letter to me. The latter two sections of that report are as damaging to my case as they are substantially based upon untruths; and I can plainly see that my efforts to explain my reasons for my

views and claims were wide of the actual mark.—It was not an explanation of my views that was needed, but a complete refutation of untrue assumptions and opinions of the Hearing Officer whose statements have so unjustly influenced official opinion.

It is largely because of the Hearing Officer's report that I have been mistakenly classified 1-A, and subsequently ordered to appear for induction July 26, 1943.

My claims both for 4-D and 4-E, listed in my appeal to the Appeal Board, have been rejected on the basis of the material contained in the report of Hugh K. McKevitt, Hearing Officer. After much difficulty in gaining access to a copy of this report, I have at last seen all of it that I know exists, and find it capricious, incompetent, and unjust for the following reasons:

"Statement of Facts"

(a) No instance of evidence refuting my claim as a regular minister.

(b) No instance of evidence refuting my claim as a conscientious objector.

(c) Do not believe high-school Dean referred to was Dean at time of my attendance, and his testimony as regards the then existent scholastic requirements is in error. That this testimony proves nothing relevant.

(d) Reporting of stated manner in which my sermons may be released is not entirely accurate.

(e) Version of my statement in answer to ques-

tion regarding a Japanese attack incomplete and inaccurate.

(f) Testimony of Clerk of Local Board is self-admitted to have been a long time ago, and based upon his personal reaction only to but very casual meeting with me in the course of my visits to his office; and that he did not know me very well then.

(g) An obvious misconstrual of the "Church of the Heart" as being an unheard of seet, rather than a summarization of my mental attitude.

(h) Erroneous assumption that I changed an address at the dictates of "Mankind United" officials.

(i) Inaccurate reporting of my wife's testimony respecting my future professional intentions.

(j) Excepting the above errors and some other minor mistakes, the report is completely favorable to my claims, and should be accepted as true testimony given by honest people well aware of the gravity of this entire matter.

"Findings of Fact"

(a) Showing a complete disregard for investigative findings of F. B. I.

(b) Opinion as to my lack of truthfulness is based in part upon my general appearance and clothing which are irrelevant factors in proving my sincerity. (Hearing Officer errs badly here, since I can prove that most of my clothing purchased before war.)

(c) Hearing Officer errs again when he decides that I cannot be believed when I say that my wife

and I do live on $50.00 per month. We do not pay rent, therefore this sum exceeds that which we had for similar purposes to meet our general living expenses when I worked for W. P. A. The Government then did not think it impossible to live on such earnings. (We can prove that we do live on $50.00 per month, and that this sum is our sole personal and joint income.)

(d) Hearing Officer assumes personal responsibility for a mere opinion that denies I am a minister by declaring "Mankind United" not a religious movement. . . . Providing no proof to support his assertion

(e) Hearing Officer errs in denying that I am sincere in my claim as consicentious objector by his untrue assertion that my claim arises from my association with "Mankind United"; and coloring this false premise by further citing irrelevant cases of persons connected with the movement as further proof of my lying and insincerity.

(f) Since Hearing Officer did not express any doubt to me of my lack of knowing the address of the "Timely Book Library", he is without cause to infer that I will not reveal it.—Neither my wife nor I know the address.

(g) Hearing Officer errs in that I can prove that I have been writing sermons for future use. (This, I thought, was fully explained in my letter given to Hearing Officer.)

(h) Hearing Officer errs in saying that I base my claim as a conscientious objector only upon my claim as a regular minister.

(i) Hearing Officer errs badly withal in assuming that I and those testifying for me cannot be believed.

"Conclusion"

(a) Hearing Officer bases his conclusion and recommendations upon loose and false assumptions, inaccuracies, and a complete disregard for testimony given at the request of duly appointed authorities, or under oath; upon my association with a movement that has never been proved illegal, or unAmerican by any court or investigation, however irrelevant such association may be to my claim as a conscientious objector; and because of this is unjust and I believe biased, and prejudiced judgment on his part.

Further, at the time of my interview with Hearing Officer, he asked no questions and received no answers that could lead him to the assumption he has filed on government record. Instead, he said, before three other witnesses, that my case should never have come into his hands; and that it would have to be sent to Washington. All of this may have been in some respects true, but he did not indicate in any way that he had so important a part in deciding the outcome of the matter; and by his "demeanor" belied his true authority in this case, leading my witnesses and me to believe that further substantiation of my stateemnts and claims was useless before him since he would not be handling my case.—This, it is proved, was a gross, and perhaps a deliberate misrepresentation on his part giving all present the firm conviction that he

was in no way concerned with my case, nor that he disbelieved my testimony.

Consequently, in view of the existing facts, please regard this letter as a request that you take action to correct an obvious injustice by re-opening my case for a complete investigation by the Selective Service System; and, please suspend by induction pending the proceedings and outcome of the investigation.

I make the above request in full knowledge of my own honesty and the unwarranted, and untrue aspersions cast upon it, and the testimony of those who have spoken in my behalf; as well as the reflections cast upon the competency of the F. B. I. agents who conducted the investigation and made the report cited in Mr. McKevitt's digest.

Very truly yours,

#1165, Local Board No. 89.

[Endorsed]: Filed 11-16-43.

[Endorsed]: No. 10616. United States Circuit Court of Appeals, for the Ninth Circuit. Claibourne Randolph Tatum, Appellant. vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 25, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit: The October Term 1943, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the eleventh day of February in the year of our Lord one thousaid nine hundred and forty-four.

Present:

Honorable Curtis D. Wilbur, Senior Cricuit Judge, Presiding, Honorable Francis A. Garrecht, Circuit Judge, Honorable Clifton Mathews, Circuit Judge.

No. 10616

CLAIBOURNE RANDOLPH TATUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER GRANTING MOTION FOR BAIL PENDING APPEAL

Upon consideration of the motion of appellant for admission to bail pending appeal, and of the oral argument of counsel for respective parties thereon, and good cause therefor appearing,

It Is Ordered that said motion for admission of appellant to bail pending appeal be, and hereby is granted, and that appellant be, and he hereby is granted bail in the amount of Five Thousand Dollars, the bond to be conditioned as required by law,

to be approved by the clerk of this Court and filed in the clerk's office of this Court.

In the District Court of the United States
Northern District of California

No. 10616

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CLAIBOURNE RANDOLPH TATUM,
Defendant.

BAIL BOND ON APPEAL

Bond Number 824-0020.

Know All Men by These Presents:

That we, Claibourne Randolph Tatum as Principal, and the Northwest Casualty Company, a Washington Corporation, a surety, are jointly and severally held firmly bound unto the United States of America in the sum of Five Thousand Dollars ($5000.00), for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Wheras, lately, to-wit, on the 15th day of November, 1943, at a term of the District Court of the United States, in and for the Northern District of California, Southern Division, in an action pending

in said Court in which the United States of America is Plaintiff, and Claibourne Randolph Tatur was Defendant, judgment and sentence was made, given, rendered and entered against the said Defendant in the above entitled action, whereas he was convicted as charged in the indictment;

Whereas, in said judgment and sentence, so made, given, rendered and entered against said Claibourne Randolph Tatum, it was ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Penitentiary Type, to be designated by the Attorney General or his Authorized representative for a period of Three (3) Years.

Whereas, the said Claibourne Randolph Tatum, has filed notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Claibourne Randolph Tatum, has been admitted to bail pending the decision upon said appeal, in the sum of Five Thousand Dollars ($5000.00).

Now Therefore, the conditions of this obligation are such that if said Claibourne Randolph Tatum shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal; and if the said Claibourne Randolph Tatum shall abide by and obey Court

orders by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said Claibourne Randolph Tatum shall surrender himself in execution of said judgment and sentence, if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said Claibourne Randolph Tatum will appear for trial in the District Court of the United States, in and for the Northern District of California, Southern Division, on such day or days as may be appointed for retrial by said District Court, and if the said judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

This Recognizance shall be deemed and construed to contain the "express agreement", summary judgment and eexcution thereon, mention in Rule 13 of the District Court.

CLAIBOURNE RANDOLPH TATUM
Principal.
Federal Prison Camp,
Box P. M. B. 737 MC.
Address: Steilacoom, Washington

[Seal] NORTHWEST CASUALTY COMPANY,
a Washington Corporation.
BY A. W. APPEL
Its Attorney-in-Fact Surety.

Approved as to Form
FRANK J. HENNESSEY
United States Attorney

I hereby certify that I have examined the within bond and that in my opinion the form is correct and surety theron is qualified.

THEODORE TAMBA
Attorney for Defendant and Appellant.

The foregoing bond is approved this 1st day of March, 1944.

PAUL P. O'BRIEN
Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

State of Washington
County of Pierce—ss.

On this 19th day of February, A. D. 1944, before me, John J. Hopkins, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared Claibourne Randolph Tatum, to me personally known to be the individual described in and who executed the within instrument, and he acknowledged the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office at McNeil Island, County of Pierce, State of Washington, the day and year first above written.

[Seal] JOHN J. HOPKINS
Notary Public in and for the County of Pierce, State of Washington.
My Commission Expires October 27, 1947.

State of California
County of Los Angeles—ss.

On this 14th day of February, A. D. 1944, before me, Marva Weede, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared A. W. Appel, Attorney-in-Fact of the Northwest Casualty Company, a Washington corporation, to me personally known to be the individual and officer described in and who executed the within instrument, and he acknowledged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles, County of Los Angeles, the day and year first above written.

[Seal] MARVA WEEDE
Notary Public in and for the County of Los Angeles, State of California.
My Commission Expires February 3, 1946.

[Endorsed]: Filed March 1, 1944. Paul P. O'Brien, Clerk.

No. 10616.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLAIBOURNE RANDOLPH TATUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 10616.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLAIBOURNE RANDOLPH TATUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of conviction of the appellant by the District Court for the Northern District of California, Southern Division, and a jury thereof.

This court has jurisdiction under the provisions of 28 United States Code, Section 225, Subdivision (a), First and Third Subdivision (d).

Statement of Case.

Appellant, one of Mankind United's associates, was convicted in the court below under an indictment for a violation of the Selective Training and Service Act of 1940 [R. p. 2] which charged that he did

> "knowingly and feloniously fail and neglect to comply with the order of his said local board No. 89, to report for induction into the land or naval Forces of

the United States, as provided in the said Selective Training and Service Act of 1940 and the rules and regulations made pursuant thereto."

In the court below and before the Selective Service Agencies he claimed to be a minister and that he was entitled to a classification as such under the Selective Training and Service Act.

During the trial it appeared that appellant's case had not been handled by the local draft board as provided by the Selective Service regulations. [R. p. 22.]

In addition, the court failed to give instructions requested by appellant on the failure of the local draft board to follow the Selective Service regulations. [R. pp. 57-8.]

In addition, the Hearing Officer violated the Selective Service regulations. [R. p. 36.]

Finally, the United States Attorney was guilty of prejudicial misconduct [R. p. 50] in his argument to the jury.

Questions Involved.

I.

Is this case to be distinguished from *Falbo v. United States?*

II.

Was the appellant denied "due process of law" by reason of the alleged failures of the local draft board and of the Hearing Officer to follow Selective Service regulations?

III.

Was there prejudicial misconduct by the United States Attorney?

Specifications of Assigned Errors to Be Relied Upon.

The transcript of record, page 74, contains six assignments of errors specified by attorneys for appellant.

The appellant now relies upon specification No. 3 and specification No. 6.

Other assignments are abandoned by reason of the decision of the Supreme Court in the case of *Falbo v. United States*, 320 U. S. 549.

ARGUMENT.

POINT I.

The Instant Case Is Not Determined by the Falbo Case.

Falbo v. United States decided some but not all of the points originally raised in this appeal.

Appellant no longer contends that he is entitled to a judicial review of the *propriety* or of the alleged arbitrariness of the draft board's classification. Neither does he contest the *power* and authority of the board to make any decision within the Selective Training and Service Act of 1940 and the regulations adopted thereunder.

Deprival of "due process" is the issue that removes this case from the guillotine of the *Falbo* decision. The Supreme Court pointedly called its *Falbo* pronouncement a decision on the "narrow question" of the availability of judicial review of the propriety of a board's classification.

The instant case involves *procedural failure* and will be discussed more fully under Point II of this argument.

It is submitted that the courts may set aside an administrative determination where a procedural failure is

apparent even in the absence of a congressional provision for a judicial review:

Ng Fung Ho v. White, 259 U. S. 276;

Gegiow v. Uhl, 239 U. S. 3;

School of Magnetic Healing v. McAnulty, 187 U. S. 94;

Crf R. F. C. v. Bankers Trust Company, 318 U. S. 163.

Also see:

Monongahela Bridge Co. v. United States, 216 U. S. 177, 195:

"Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under the Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they cannot find some remedy consistent with the law, for acts, whether done by governments or by individual persons, that violated principles devised for the protection of essential rights of property."

This is also the situation in *Cobbledick v. United States,* 309 U. S. 323, where it said:

"At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not

> to allow this interruption would forever preclude review of the witness' claim for his alternatives are to abandon the claim or languish in jail."

Also in *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio*, 301 U. S. 292, 304-305:

> "The right to such a hearing is one of the rudiments of fair play . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or cause of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In our own circuit *after the Falbo decision* a district court has distinguished the case before it from the decision of the Supreme Court in the *Falbo* case. In *United States v. Peterson* [Appendix A] the United States District Court for the Northern District of California, January 28, 1944, the defendant moved to dismiss the indictment because of insufficient evidence to support the charge of failure to report for induction. Defendant had requested a personal hearing of his draft board but the board discussed his case privately and relayed its decision, by the clerk, to the defendant, who was waiting in the outer office. The court held the defendant had not been accorded due process of law and granted the motion to dismiss. The court emphasized that here the question was not whether registrant was properly classified but involves the effect of an omission of a "step in the selective process."

Before the *Peterson* decision United States District Court Judge A. F. St. Sure reached the same conclusion on a similar set of facts. [Appendix B.]

POINT II.

The Failures of the Local Board and of the Hearing Officer to Follow Selective Service Regulations Deprived Appellant of Due Process of Law and the Refusal of the Trial Court to Instruct the Jury on These Irregularities as Requested Was Prejudicial Error.

A.

The local draft board did not consider, or even read, the affidavits the appellant submitted for the November 20, 1943, hearing. At this time appellant attempted to show the board that it had misclassified him and in the transcript of record, page 22, appears the following testimony elicited on cross-examination of John J. Foley, member of Selective Service Local Board No. 89 of San Francisco, and chairman thereof.

> "These affidavits, Defendant's Exhibits B and C, were not read by the members of Local Board No. 89, and were not used by us in classifying defendant, but were part of the appeal record."

Local draft boards are required to "consider" such submitted documents.

Section 625.2 (c) of the Selective Service regulations provides as follows:

> "(c) After the registrant has appeared before the member or members of the Local Board designated for the purpose, the Local Board *shall consider the new information which it received* and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induc-

> tion (Form 221), already in his file, shall be used in case his physical or mental condition must be determined in order to complete his classification." (Italics ours.)

That the above regulation is mandatory is the clear inference in the decision of *In the Matter of Stanziale v. U. S.* (C. C. A. 3d), 138 F. (2d) 312, 316:

> "If the Board considered the case in the light of the facts presented to it the registrant cannot have court review by claiming that a wrong conclusion was reached even if we, were we triers of fact, might agree with him."

That local draft board No. 89 did not consider appellant's case "in the light of the facts presented to it" is clear. This refusal and failure of the board to read the evidence submitted to it by appellant substantially deprived appellant of his right to a personal appearance. Appellant was entitled to a personal appearance, under the regulations, and to one that was not a sham or mere pretense. The failure to accord appellant his rights was a denial of due process of law. Appellant's requested instructions No. 7 and No. 8 covered these points, were denied by the court, and exceptions thereto were timely taken. [R. 53.]

Denial of a hearing of the kind and character provided by the Selective Service regulations is the same as the denial of any hearing. See *U. S. ex rel. Vajteauer v. Commissioner of Immigration,* 273 U. S. 103.

Denial of the requested instructions on the "hearing" rights of registrants deprived appellant of due process of law within the meaning of the Fifth Amendment. See *Yamatoya v. Fisher,* 189 U. S. 86, and *St. Joseph Stockyards v. United States,* 298 U. S. 32.

In *Morgan v. United States,* 304 U. S. 1, 14, Chief Justice Hughes stated:

> ". . . Vast expansion of administrative agencies makes necessary that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."

B.

The testimony of appellant shows moreover [R. p. 36], that the Hearing Officer never indicated to appellant that any evidence was in the Hearing Officer's possession that contradicted appellant's statements. The Hearing Officer's conclusion [R. pp. 161-2] shows that he had unfavorable evidence in his possession; but he gave appellant no opportunity to explain or rebut. Section 627.25 of the Selective Service regulations provides that the registrant shall be notified of the hearing before the Hearing Officer and the notification [Appendix C] contains information concerning the instructions given the Hearing Officer by the Department of Justice, Office of the Assistant Attorney General.[1] Instruction 4 reads:

> "At the hearing, the registrant at his request, will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence."

---

[1]This court may take judicial notice of these instructions. *Bowles v. United States,* 319 U. S. 33, 87 L. ed. 1194, 1196.

It is only fair that a registrant should have an opportunity to meet evidence that is to be used against him. The necessities of the situation probably demand that the individual be deprived of an opportunity to meet face to face his accusers or even the agents who gather the accusations. Yet, it is certainly too summary an abandonment of the fundamental rights our American constitutional system accords an accused, for one acting as a judge to keep the registrant in ignorance of the accusations. Chief Justice Hughes in the *Morgan* case *(supra)* observed:

> "If these multiplying (administrative) agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

In accord are the *St. Joseph Stockyards* and *Yamatoya* cases *(supra)*.

POINT III.

The Argument of the United States Attorney to the Jury Was Prejudicial Misconduct.

On pages 50 and 51 of the transcript of record we find the following highly improper statements made in argument to the jury:

"Mr. Karesh: . . . I call your attention to the blood of the battlefield—

Mr. Wirin: We object to the blood of the battlefield and charge it as a prejudicial statement of counsel. We ask that the Court instruct counsel not to refer to the blood of the battlefield in his argument.

Mr. Karesh: I see nothing prejudicial about it, and I say to Your Honor—with all respect this is—it is the Selective Service System, and under the Selective Service Act if a man is called and refuses to respond, someone else must be called.

The Court: Proceed.

Mr. Wirin: May we have an exception?

The Court: Note an exception.

. . . . . .

Mr. Karesh: And by inference he casts on those who are now fighting in the armed forces of our country the stigma of traitor to God, on those men who were willing—

Mr. Wirin: I want to address this Court. I object to that remark of counsel on the ground it is highly prejudicial to the defendant, and we ask the Court to instruct counsel not to make that argument, on the ground it is improper, an unwarranted inference from any of the evidence in this case, and a consciously improper effort by the prosecutor to appeal to the prejudice of the jury.

Mr. Karesh: I can say, Your Honor, if anyone attempted to appeal to the patience [sic] and prejudice of anyone, it was you, yourself, counsel.

Mr. Wirin: Your Honor, we assign that as additional misconduct on the part of the prosecutor and request the Court to instruct the jury to disregard the statement of Mr. Karesh.

Mr. Karesh: Rather than to quibble, Your Honor, on such an issue, I will withdraw my argument on that point.

Mr. Wirin: No, we state to the Court the statement made by counsel—

The Court: What statement?

Mr. Wirin: The statement made about me is highly improper and an appeal to the prejudice of the jury.

The Court: Let the statements of both counsel go out and the jury will disregard them for all purposes in this case.

Mr. Wirin: May we have an exception, Your Honor?

The Court: Proceed.

Mr. Karesh: I might say the testimony of the defendant, 'traitor to God,' stands for itself."

These inflammatory statements were obviously intended to cause the jury's verdict to be the result of emotion rather than reason. Waving a bloody shirt may be accepted political tactics but should meet prompt rebuke when attempted in court. So said the Supreme Court in *Viereck v. The United States,* 318 U. S. 236, 63 S. Ct. 561, 87 L. Ed. 734:

"We think that the trial judge should have stopped counsel's discourse without waiting for an objection."

Although the *Viereck* case is comparatively recent it has been quoted and cited so frequently that it perhaps can be considered a landmark. Immediately preceding the above quotation the court said:

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted."

The objectionable remarks of government counsel in the *Viereck* case were quoted by the court as follows:

> " 'In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.
>
> " 'This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.
>
> " 'As a representative of your government I am calling upon every one of you to do your duty.' "

As an answer to this last statement the court quoted *Berger v. United States,* 295 U. S. 78, 88:

> " 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all times; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' "

These views are reflected in the California state courts. *People v. McDaniel,* 140 P. (2d) 88, 92, and *People v. Lynch,* 140 P. (2d) 418, 424, by Judge White:

> "What was said by the Chief Justice of the United States Supreme Court in the case of *Viereck v. United States,* 318 U. S. 236, 63 S. Ct. 561, 566, 87 L. Ed. ....., reflects our views as to the duties and obligations of a prosecuting officer."

Again, in *Bagley v. The United States,* 136 F. (2d) 567, 570:

> " 'At a time when passion and prejudice are heightened by emotions, stirred by our participation in a great war,' Viereck v. United States, 63 S. Ct. 561, 566, 87 L. Ed. ....., we must be particularly careful to hold to the foundations of our freedom."

Misconduct by government counsel in argument to the jury has been the reason assigned for numerous reversals. In the case of *Beck v. The United States,* 33 F. (2d) 107, 114, the court said:

> "A trial in the United States court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertainment of the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record of convictions."

Conclusion.

Selective Service regulations, intended as a shield to the rights of registrants, may not be evaded.

It is improper for government counsel to seek a conviction by an inflammatory appeal to wartime emotions.

The judgment should be reversed.

Respectfully submitted,

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Wayne M. Collins,
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Attorneys for Appellant.

APPENDIX A.

OMISSION OF STEP IN SELECTIVE SERVICE PROCESS—AUTHORITY OF BOARD

[¶ 19,694]

Local board is without authority to classify registrant not granted hearing requested. Action of local board when not within the framework of the Selective Service process is not conducive to fair administration in protecting the registrant. Digest of *United States v. Peterson,* United States District Court for Northern District of California, January 28, 1944.

See ¶ 18,625.

Defendant, a Jehovah's Witness, was charged with failure to report for induction under the Selective training and Service Act. Defendant moved to dismiss indictment because of insufficient evidence to support the charge.

When classified 1-A registrant made a written request for a personal hearing. He appeared at a meeting of the board and stated to the clerk that he wanted to see the board about his classification as a minister. The clerk took the registrant's file into the room where the board met and gave it to the members but not in the presence of the registrant. The clerk relayed to the defendant the message from the board that if he was on the approved list of ministers at State Headquarters he would be classified IV-D; otherwise he would be subject to induction. The clerk testified that the registrant was apparently satisfied. He was subsequently advised in writing that the board had received word that he was not on the approved

list of ministers and that his induction was imminent. He was sent a notice to report for induction which he refused to do. His induction was thereupon cancelled and his file sent to the Board of Appeal. The Board of Appeal classified him I-A and he was again ordered to report for induction. He once more refused to obey the order.

The motion to dismiss the indictment is predicated, the Court points out, on defendant's contention that he was not permitted a personal appearance before the board. In *United States v. Laier,* decided on November 8, 1943, the court held that a registrant who requests a personal hearing is entitled to appear before the board and be heard as part of *the due process* of law and that until such hearing is granted the board is without jurisdiction to classify him. The importance of such hearing is shown by Rule 625.2 where it is provided that "at any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification." The regulation plainly outlines the procedure to be followed by the local draft board in such circumstances.

In this particular case personal appearance was not denied but defendants' classification was actually discussed while he remained in the outer office. This, the Court holds, did not constitute compliance with the regulation permitting a personal appearance. Nor does the board have authority to delegate to the clerk of the board the power to act as its agent in the matter of personal ap-

pearance. It was not the defendant's duty to insist on his right to appear. Furthermore, under the circumstances the "apparent" demeanor of the registrant cannot be said to constitute a waiver of a written request.

Distinguishing the present proceeding from the decision of the Supreme Court in the *Falbo* case, the Court emphasizes that here the question is not whether registrant was properly classified, but involves the effect of an omission of a "step in the selective process."

The Court outlines the steps taken by a registrant and states that he "may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal, and thence, in certain circumstances, to the President. Only after he has exhausted this procedure is a protesting registrant ordered to report for service."

"Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. . . ." The order for induction was not issued "in that process" but outside of it. Accordingly, the action taken by the local board is held not to have been within the framework of the Act set up to protect the registrant, for the board was without authority to classify a registrant who requested a personal hearing, without granting him such hearing.

The motion to dismiss is therefore granted.

New Matters ¶ 19,694

APPENDIX B.

In the Southern Division of the United States District Court for the Northern District of California.

United States of America, Plaintiff, vs. John Gilbert Laier, Defendant. No. 28036-S.

OPINION.

St. Sure, District Judge:

The Grand Jury presented an indictment against the defendant charging him with failing to report for induction under the Selective Training and Service Act of 1940, 50 USCA App. 301 *et seq.* The case was tried to the Court without a jury. At the close of the trial defendant moved to dismiss the indictment on the ground that the evidence was insufficient to support the charge.

The facts are undisputed. Defendant is a registrant of Local Board No. 112 at Palo Alto, California. After he was classified by that board in class 1-A he requested an opportunity to appear in person before the board as was his right under the provisions of Rule 625.1 of the Selective Service Regulations. His request was denied. He then appealed to Board of Appeal No. 9 at San Jose, which affirmed the action of the local board in classifying the registrant in class 1-A. Thereafter the local board ordered defendant to appear for induction on May 22, 1943, and the indictment is predicated upon his failure to comply with that order.

Defendant contends that because of the failure of the board to permit him a personal appearance, he was denied due process of law, with the result that the board never acquired jurisdiction to issue an order of induction; that the order of induction issued was void and the registrant was under no legal duty to comply with it.

The Government argues that the failure of the board to grant a hearing is no defense in the present prosecution but can only be the subject of a habeas corpus proceeding after induction of the registrant; and that regardless of the rule permitting a hearing, the appeal cured any error committed by the local board.

In support of its first contention the Government cites U. S. v. Griemes and U. S. v. Sadlock, 129 F. (2nd) 811. In those cases defendants, who were Jehovah's Witnesses, attempted to introduce evidence that they should have been classified as ministers of the gospel and that the board acted arbitrarily and capriciously in classifying them as conscientious objectors. The court held that whether or not the board acted arbitrarily and capriciously was a matter to be determined on writ of habeas corpus and that it was not a defense to a criminal prosecution for failure to report for induction. In its opinion the court stated that "whether a registrant is a minister of religion presents a question of fact which, from its very nature, is committed by the act to the determination of the competent local draft board."

There is a practical reason for this rule, because to permit a court or jury in prosecutions for draft evasion to determine whether the defendant was in fact properly classified would have the effect of nullifying the power expressly committed to the draft boards to classify registrants. A similar thought is expressed in U. S. *ex rel.* Koopowitz v. Finley, 245 Fed. 871, which arose under the the Selective Draft Act of 1917: Whether a person is a non-declarant alien or not is a question of fact, exactly the same as whether a person is a duly ordained minister of religion . . ., and the clear purpose of the act was that the fact should be ascertained by the administrative

boards which the President was authorized to create. Any other method would have made the act, . . . unworkable."

The Government also cites Fletcher v. U. S., 129 Fed. (2nd) 262, where the same contention was made by the defendant, and the court held that evidence as to whether the board acted arbitrarily and capriciously was properly refused.

It may well be that where the record shows compliance with the regulations made for the protection of the registrant, and it is a question of fact and law this question should properly be determined on habeas corpus. But I am of the opinion that where, as here, the record itself shows that the draft board has disregarded the regulations and has exceeded its jurisdiction in classifying a registrant, the order to appear for induction is void as a matter of law and the indictment predicated thereon is subject to a motion to dismiss.

The provisions of Rule 625.1 are mandatory: "Every registrant . . . shall have an opportunity to appear in person . . ." under conditions which, it is admitted, the registrant complied with. Rule 625.2(c) provides in part: "After the registrant has appeared . . . the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified. . . ." Rules 625.2(d) and (3) require that the draft board, after the personal appearance of the registrant, shall mail a new notice of classification to him which is subject to the same right of appeal as the original classification. Rule 625.3 provides that if the registrant requests a personal appearance he shall not be inducted until 10 days after the new notice of classification referred to in 625.2(d) is mailed to him by the local board.

From the above provisions it clearly appears that the registrant is entitled to a hearing as a matter of right. And it is settled law that such a personal hearing is a part of due process in such proceedings. 16 C. J. S. 622; St. Joseph Stockyards Co. v. U. S., 298 U. S. 38; Yamatoya v. Fisher, 189 U. S. 86.

It is also apparent that the application for an opportunity to be heard actually suspends the classification of the registrant who after such hearing must be reclassified "in the same manner as if he had never before been classified," and that he may not be inducted until ten days after he receives the new notice of classification.

Admittedly, the local board failed to comply with these provisions, and the effect of such failure would seem to be that the registrant was not classified at all, nor could he legally be inducted, at the time it made its order. In issuing its order, the board acted entirely outside its jurisdiction and without any legal authority.

The government further contends that the appeal by registrant to the Board of Appeal cured any error that the local board may have committed. It is urged that because the defendant furnished the appeal board with all the information that he might have presented at a hearing before the local board he was not prejudiced.

The fact that the Board of Appeal sustained the classification made by the local board in no way lent legality to its erroneous procedure. Defendant was entitled under the Regulations and as a part of due process of law to make a personal appearance. As well might it be said that an accused who was incarcerated during a criminal trial but permitted to submit a written statement of his case in court and present his case. Moreover, if the regulations had been followed, defendant would have been

entitled to an appeal from the new classification, which in his case was never made.

The Government cites Bowles v. U. S., 319 U. S. 33, as supporting its contention. There the defendant contended that the local board misinterpreted the act in classifying him. A final appeal by the registrant to the President had been granted, and the Director on that appeal made a determination of fact adverse to the claim of petitioner that he was a conscientious objector. The Supreme Court held that this determination superseded that of the local board, that the order for induction was based upon that determination, and that therefore, whether or not the registrant was given a fair hearing before the local board was not a defense to the criminal prosecution. Where facts are determined *de novo* on appeal, the appellant is not prejudiced by error committed by the inferior fact-finding body. In the present case, however, the objection is not made primarily to the facts as found by the local board but to the fact that defendant was denied his lawful right to appear in person and be heard. This error, it would seem, could be cured only by granting such hearing.

The motion to dismiss the indictment will be granted.

Nov. 8, 1943.

APPENDIX C.

DEPARTMENT OF JUSTICE

Office of the Assistant to the Attorney General
Washington

Revised October 10, 1942.

INSTRUCTIONS AND DIRECTIONS TO REGISTRANTS CLAIMING EXEMPTION AS CONSCIENTIOUS OBJECTORS.

Pursuant to the provisions of Section 5(g) of the Selective Training and Service Act of 1940 and Section 627.25 of the Selective Service Regulations, the Department of Justice is required to make an inquiry and to hold a hearing with respect to the character and good faith of the objections of each registrant whose claim for exemption from training and service under the said Act on the ground that he is conscientiously opposed to participation in war has been denied (or granted) by a local board, and an appeal has been taken to an appeal board.

1. In each instance, the hearing will be conducted by a duly designated Hearing Officer, and the registrant will be duly notified by the Hearing Officer of the place and time fixed for the hearing on his claim.

2. Upon receipt of the notice of hearing by the registrant, and before the date and time set for the hearing, the registrant *should communicate in writing with the Hearing Officer* and advise whether he will appear at such hearing.

(a) If it is impossible for the registrant to appear on the date and at the time scheduled, he should state to the Hearing Officer in writing the reasons which make it impossible for him to do so, and request postponement of the hearing which, in the discretion of

the Hearing Officer, may be granted, and a new date and time scheduled.

(b) If the registrant, without explanation, does not appear for hearing, the Hearing Officer will consider the registrant to have waived his right to hearing, and will proceed to make his recommendation on the basis of the record and evidence contained in the registrant's Selective Service file.

3. If, at the time of receipt of notice of hearing, the registrant no longer desires to be considered as a conscientious objector, he should immediately address a letter to the Hearing Officer stating that he will not appear for hearing and that he desires to withdraw his claim for exemption as a conscientious objector.

4. At the hearing, the registrant, at his request, will be informed by the Hearing Officer as to the general nature and character of any evidence disclosed by the investigation which is unfavorable to, or tends to defeat, his claim for exemption as a conscientious objector, and the registrant will be afforded an opportunity to explain or rebut such evidence.

5. At the hearing before the Hearing Officer of the Department of Justice, the registrant will be permitted to make a full and complete presentation of his claim. He may bring with him to the hearing as witnesses any persons who have personal knowledge of facts concerning his religious training and belief and concerning the character and good faith of his objections to participation in war.

6. The registrant may bring with him and submit at the hearing written statements of persons not present at the hearing containing facts and information within their personal knowledge concerning the registrant's religious

training and belief and the character and good faith of his objections to participation in war. Such statements shall be sworn to before a notary public or other person authorized to administer oaths. The registrant may also submit at the hearing any papers or documents, or certified copies thereof, tending to support his claim.

7. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Registrants will not be required to adhere to the ordinary rules of evidence. It will not be necessary for the registrant to be represented at the hearing by an attorney. The registrant may bring with him a relative or friend or other adviser, who may sit with him at the hearing. Such persons, whether an attorney or not, will not be permitted to object to questions or make any argument concerning any evidence or any phase of the proceeding. The hearing will at all times be under the direction and control of a duly designated Hearing Officer, who may terminate the proceeding upon the violation of these instructions by the registrant or his adviser.

8. Ordinarily, no stenographic record of the oral testimony given at the hearing will be made. However, the Hearing Officer may, in his discretion, have such record made.

JAMES ROWE, JR.,
The Assistant to the Attorney General.

No. 10,616

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLAIBOURNE RANDOLPH TATUM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

R. B. MCMILLAN,
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Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JACK W. BAGLEY, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 10,574 Jun. 14, 1944

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

---

Before: DENMAN, STEPHENS and HEALY, Circuit Judges.

STEPHENS, Circuit Judge.

Jack W. Bagley was convicted in the district court of knowingly and feloniously failing to comply with the order of the Selective Training and Service Board for induction into the armed services of the United States (Selective Training and Service Act of 1940, 54 Stat. 885, 50 USCA §§ 301-318, specifically § 311). He appeals from the judgment.

It is agreed that the order to report was made and that he has not complied therewith. At the trial he claimed, and he makes the same claim here, that he "had not received a hearing by the Hearing Officer such as the law granted him." Specifically, he claims that the order is void and, therefore, no order at all; that the Hearing Officer refused to inform the registrant, who was claiming to be a conscientious objector, as to the general nature and character of any evidence unfavorable to him; that the Hearing Officer misled the registrant by advising him that there was no evidence against him, after which the Hearing Officer based his adverse ruling upon evidence which he had notwithstanding his statement to the registrant. The latter further claimed that he was not given "a personal hearing by a local Draft Board," and at the trial written proposals of instructions, pertinent to such alleged defenses, were furnished the court with the request that they be

the religious sect of which he is a member, and had refused to classify him as a minister against the overwhelming weight of the evidence."

It seems to us that if the order in the Falbo case would not cease to be an order upon the showing that it was based upon "antipathy" to appellant's religious sect, then by parity of reasoning the order in our case would not cease to be an order upon the showing suggested. The Supreme Court took no note of the theory advanced by appellant and went directly to the heart of the question. It said [p. 554 of the opinion]: "Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." [See Billings v. Truesdell, ... US ....., (March 27, 1944) upon the subject of last step in the selective process.] The court in the Falbo case continued: "* * * But Congress apparently regarded a prompt and unhesitating obedience to orders issued in that process 'indispensable to the complete attainment of the object' of national defense. Martin v. Mott, 12 Wheat. 19, 30. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.

"Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made. * * *."

Since the Falbo case the Supreme Court has again spoken. In Billings v. Truesdell, supra, appears the following: "It should be remembered that he who reports at the induction station is following the procedure outlined in the Falbo case for exhaustion of his administrative remedies. *Unless he follows that procedure he may not challenge the legality of his classification in the courts. It follows that one who follows that procedure has exhausted all necessary administrative steps, and may then challenge an order in the courts.*" [Emphasis added.]

We conclude that a hearing out of which a Selective Service Board has issued its order directing registrant to report for service cannot be inquired into as a defense in a criminal proceeding in which the registrant is charged with failure to comply with the order.

The Motion.

Coincident with the oral argument of the case on appeal before us appellant presented its motion to remand the case to the district court. We have treated the appeal first because in so doing, the facts need not be twice stated.

The basis of the motion is that appellant mistook the law when he failed to obey the order of the Selective Service Board to report for duty. He did not know at the time, he says, that his administrative remedies against obeying the order extended up to but not after the actual induction into the service as described in great particularity in the case of Billings v. Truesdell, supra, which came out sometime after the trial of his case. He now states by affidavit that he is willing to obey the order to report. It should not be understood that the affidavit indicates a willingness to be inducted into the services of his country. However, his continuing unwillingness to be inducted is in no wise prejudicial. He has a perfect right, which we must and do respect, to hold and in the proper proceeding to assert his conscientious views.

Appellant argues that he did not understand the applicable law until the Supreme Court made it plain by Billings v. Truesdell, supra. It may be that appellant misapprehended his administrative remedies and for that reason did not pursue them prior to his indictment for failure to obey the order to report, but we know of no power of an appellate court to nullify the action taken by the enforcement authorities and the courts upon a showing of such misapprehension. He chose to act as he did, and, as it seems to us, we have no power whatever to reverse the conviction and remand the case so that he may chose another course. Appellant has not as yet been inducted, and it is quite possible even after affirmance of the conviction that he has adequate means of testing whether or not he has been accorded due process. Although it cannot be used to the full extent of the writ of error, the writ of habeas corpus has of late years been greatly enlarged, and where

the registrant has exhausted the remedies provided, he may test the "due process" question by resort to this remedial writ.

It is argued that former Chief Justice Hughes said in Patterson v. Alabama, 294 US 600-607: "We have frequently held that in the exercise of our jurisdiction we have power not only to correct error in the judgment under review, but to make such disposition of the case as justice requires. And in determining what justice does require, the court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act." This statement was made in a case where two persons had been condemned to death after a court trial in which they had been denied important constitutional rights. The two cases are not comparable. There is nothing in the instant case from which we could say, in the sense the expression was used by the great Chief Justice, that justice requires or authorizes us to act. No right has been denied appellant; no change of law or fact has come about. We can appropriately refer in the same way to the other cases cited by counsel. The cases of McNabb v. United States, 318 US 332, and Gros v. United States, 136 Fed(2d) 878, do not assist appellant. Those cases concerned violations of law in the use of oppressive and coercive methods by officers of the law in securing evidence against accused persons.

Counsel's reference to our "broad authority of judicial supervision over the administration of criminal justice" (borrowed from the McNabb opinion) does not give us a free hand to reverse and remand. We have no power to grant the relief requested. Appellant may yet submit his grievance to the courts in an appropriate proceeding, or he may seek executive relief or both as he may be advised.

The motion is denied and the judgment is affirmed.

(Endorsed:) Opinion. Filed Jun. 14, 1944. Paul P. O'Brien, Clerk.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO. 6/15/44—110.

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No. 10,616

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLAIBOURNE RANDOLPH TATUM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The facts set forth by the appellant relative to the pleadings of this case are correctly stated.

The following is a brief statement of the essential facts disclosed by the evidence introduced at the trial.

The appellant, born March 15, 1913 at San Francisco, California, registered for Selective Service on October 16, 1940 with Local Board No. 89 of that City (T. p. 16). He filed his questionnaire with his Local Board on May 17, 1941, and in his questionnaire he stated that he was married and that his wife was dependent upon him for support (T. p. 16). The Board granted him a dependency deferment and classified him in Class III (T. p. 16). Subsequently the Board reopened his classification, and the appellant then for the first time requested a "Special Form for

Conscientious Objector", filed the same claiming exemption from both combatant and non-combatant service (Class IV-E) by reason of his religious training and belief (T. p. 17). Appellant requested a personal hearing before the members of the Board, the request was granted, the hearing was held on June 8, 1942, and after the hearing the Board continued the dependency deferment which it had previously granted (T. p. 17).

Thereafter the Board again reopened the appellant's classification, and notified the appellant that it had found him available for general military service, and had classified him in Class I-A (T. p. 17). The appellant requested another personal hearing before the Board, and the said hearing was held on November 20, 1942 (T. p. 17). The Board then changed the appellant's classification, finding him available for non-combatant military service (Class I-A-O), and notified him accordingly. The Board, however, refused to give the appellant a IV-E classification, and it likewise refused to grant appellant's request which he made for the first time on November 20, 1942, that he be given a classification of IV-D as a minister of the gospel (T. p. 17 and T. pp. 115-118). On November 20, 1942 the appellant filed an appeal from the decision of the Local Board to the Board of Appeal, and on June 1, 1943 the Board of Appeal unanimously placed the appellant in Class I-A, and the appellant was notified of such action on June 16, 1943 (T. p. 19). The file of the Local Board likewise discloses that as an incident of the appeal, a hearing was conducted by the Department of Justice under Section 5(g) of

the Selective Training and Service Act of 1940; that such hearing was held before a Hearing Officer in San Francisco, California, on March 30, 1943; that the appellant appeared accompanied by his wife and a Mr. and Mrs. Frederick W. Rosher; that all of them were heard, and that the Hearing Officer recommended that appellant's claim as a conscientious objector should not be sustained; that he should not remain in Class I-A-O as recommended by the Local Board, but instead should be placed in Class I-A (T. pp. 144-162). Appellant wrote a letter to the State Director of Selective Service requesting him to take a Presidential appeal in his behalf (T. pp. 193-211), but the State Director replied on July 1, 1943 that he had reviewed the appellant's file and that such action would not be warranted (T. pp. 211 and 212). On July 10, 1943 the Local Board mailed the appellant an order to report for induction into the land or naval forces of the United States at San Francisco, California, on the 26th day of July, 1943 (T. p. 19). Appellant admitted the receipt of the order to report for induction and his failure to report (T. p. 23). He also stated that he was unwilling to report to a camp for conscientious objectors (T. p. 23). Appellant was likewise mailed a "Notice of Delinquency" on July 26, 1943 (T. p. 19). Appellant replied by letter on July 30, 1943 (T. p. 124) to the Notice of Delinquency, and declared, after mentioning his affiliation with "Mankind United" (T. p. 131), that he would not report for induction into a service which he stated "is not God's" (T. p. 137). It was because of this failure to comply with the order of induction that

he was indicted for a violation of the Selective Training and Service Act of 1940 (50 U.S.C.A., Section 311).

THE ISSUES.

All of appellant's assignments of error raise but two issues which we believe may be fairly and correctly stated as follows:

I. May a defendant who has been indicted for his failure to report for induction into the armed forces of the United States defend such failure in a criminal prosecution by collaterally attacking the Board's administrative acts?

II. Was the argument of the United States Attorney to the jury prejudicial misconduct?

POSITION OF THE GOVERNMENT.

The answer to the above stated questions is "No".

ARGUMENT.

I.

A DEFENDANT WHO HAS BEEN INDICTED FOR HIS FAILURE TO REPORT FOR INDUCTION INTO THE ARMED FORCES OF THE UNITED STATES MAY NOT DEFEND SUCH FAILURE IN A CRIMINAL PROSECUTION BY COLLATERALLY ATTACKING THE BOARD'S ADMINISTRATIVE ACTS.

The first issue above stated is precisely the one considered by the Supreme Court of the United States

in the case of *Falbo v. United States,* 320 U.S. 549, in which the said Court affirmed the conviction of the appellant. In its decision the Supreme Court said:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an order directing a registrant to report for the last step in the selective process. We think it was not."

To the same effect see also:

United States v. Bowles, 131 F. (2d) 818 (CCA-3) affirmed on another ground, 319 U.S. 333;

United States v. Grieme, 128 F. (2d) 811 (CCA-3);

Fletcher v. United States, 129 F. (2d) 262 (CCA-5);

United States v. Kauten, 133 F. (2d) 703 (CCA-2);

United States v. Mroz, 136 F. (2d) 221 (CCA-7);

Gutman v. United States (CCA-9), unreported, decided March 7, 1944, No. 10,488;

Bagley v. United States (CCA-9), decided June 14, 1944, No. 10,574.

Appellant places great stress on what he considers the failure of the Local Board and the Hearing Officer to follow Selective Service regulations, although there is nothing in the record of this case to warrant such an accusation. In the *Bagley* case, the appellant argued precisely the same points, but this Honorable

Court in that case affirmed the judgment of conviction, and predicated its decision on the *Falbo* case.

II.

THE UNITED STATES ATTORNEY DID NOT COMMIT PREJUDICIAL MISCONDUCT IN HIS ARGUMENT TO THE JURY.

As for the second issue, it is obvious that the United States Attorney did not commit any misconduct in his argument to the jury, prejudicial or otherwise. Certainly the United States Attorney had a right to speak as he did in view of the fact, as the record discloses, that among other things, appellant had boasted of his being a descendant of the Randolphs of Virginia (T. p. 25), had stated that the members of our armed forces are committing murder (T. pp. 38-39), had bitterly attacked the institutions of organized religion and its clergy (T. p. 129), and had declared that he would be a traitor to God if he entered the armed forces of the United States (T. p. 37). The appellant insists that the United States Attorney indulged in "accepted political tactics" by "waving a bloody shirt". This accusation is clearly unwarranted because it is totally unsubstantiated by the facts of this case. In his argument to the jury, the United States Attorney strictly adhered to the record, and nothing that he said could possibly be construed as an appeal to the prejudice of the jury. The quotation from *Viereck v. United States,* 63 Sup. Ct. 561, to which the appellant refers, is, therefore, not pertinent to the case at bar.

CONCLUSION.

In view of the fact that the appellant was not entitled under the authority of the *Falbo* case to raise the defense which he unsuccessfully attempted during his trial, and in view of the further fact that the United States Attorney did not commit misconduct, prejudicial or otherwise, we respectfully submit that the judgment of the District Court was correct and that it should be affirmed.

Dated, San Francisco,
June 30, 1944.

FRANK J. HENNESSY,
United States Attorney,
R. B. MCMILLAN,
Assistant United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.

No. 10616

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CLAIBOURNE RANDOLPH TATUM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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No. 10616

IN THE

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CLAIBOURNE RANDOLPH TATUM,

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APPELLANT'S REPLY BRIEF.

Preliminary Statement.

Bagley v. United States (9th Cir.), No. 10574, decided June 14, 1944, as claimed by the appellee (Brief for Appellee, p. 5), authoritatively, definitively and unequivocably disposes, adversely to the appellant, of the issue of the availability to the appellant, as a defense to the instant indictment, of the denial of due process by the Selective Service agencies. This we concede.

Remaining in the instant case, however, is the important question as to whether the prosecutor's argument to the jury was so prejudicial as to require a reversal of the judgment, and thus afford the appellant an opportunity to have a new and fair trial.

ARGUMENT.

I.

The United States Attorney's Argument to the Jury Was Prejudicial, and Requires the Reversal of the Judgment.

The attempt at justification by the appellee in its brief of the remarks addressed by the prosecutor to the jury, is without merit. Statements made by the appellant, upon cross-examination, are torn from their context and seized upon, as warranting, what would otherwise clearly seem to be, a prosecutor's appeal to passion and prejudice of the jury, rather than an address to its reason and sense of fairness.

Thus the appellant did not merely state, as claimed by the appellee (Brief of Appellee, p. 6), "that the members of our armed forces are committing murder"; but the appellant explained his position thus:

> "The law is, 'Thou shalt not kill.' According to my doctrine the taking of life is murder. *I have the greatest respect for the fact that those in the Army are making a sacrifice in their own conscience, believing they are doing the right thing, and are above reproach because they believe they are doing the right thing.* But from the standpoint of universal law they are committing murder. It is not my opinion; it is already stated in the Bible." [R. 38.] (Italics ours.)

In any event, what possible justification can be found, for the use of such emotion stirring, and passion arousing language on the part of the prosecutor "I call your attention to the blood of the battlefield." [R. 50.]

That there was no justification or warrant for such a prejudicial plea is demonstrated by the lame explanation proffered by the prosecutor when objection was taken by defense counsel to the prosecutor's argument. Said the prosecutor:

> "I see nothing prejudicial about it, and I say to Your Honor—with all respect this is—it is the Selective Service System, and under the Selective Service Act if a man is called and refuses to respond, someone else must be called." [R. 50.]

Moreover, the defendant, under sharp cross-examination by an earnest and over-zealous prosecutor, who apparently was seeking to provoke statements from the defendant which could be used against him by the prosecutor in an impassioned plea to the jury, nonetheless at no time cast, by inference or otherwise any "stigma of traitor to God" upon those fighting in our armed forces, as charged by the prosecutor in his plea to the jury. [R. 50.] All the defendant stated upon cross-examination was:

> "I believe that those who go into the Army are doing something incompatible with Christian principles but *I do not condemn them for it. I would be a traitor to God if I went into the armed forces.*" [R. 37.] (Italics ours.)

It is noteworthy, moreover, that when defense counsel objected to the misstatement by the prosecutor and charged that the remark was "an unwarranted inference from any of the evidence in this case, and a consciously improper effort by the prosecutor to appeal to the prejudice of the jury." [R. 50.] The prosecutor countered

with additional misconduct by accusing, before the jury, defense counsel of having attempted to appeal to the passion and prejudice of the jury [R. 51].[1] Thereupon the prosecutor announced that he would withdraw his argument; and the Court stated to the jury that the statements of both counsel to be disregarded [R. 51]. But obviously the prejudicial misconduct by the prosecutor had by that time had its effect upon the jury; and judicial white-wash at that point, while it might have the appearance of covering the error, did not remove its indelible prejudicial effect.[2]

Surely the prosecutor's remarks must be deemed to be more offensive to the "dignity and good order with which all proceedings in Court should be conducted,[3] and much more offensive than anything the zealous prosecutor said to the jury in the *Viereck* case. The conduct of the prosecutor robbed the appellant in the instant case of his "day in court," and of his right to a fair trial. It has been said that the law should be "fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record of convictions."[4]

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[1]No objection of any kind was voiced by the prosecutor to any conduct on the part of defense counsel up to that time.

[2]An affidavit is submitted herewith set forth in the appendix, reciting the circumstances under which the objections to the prosecutor's argument were made by defense counsel. The absence of a record reciting exactly what transpired, would seem to warrant the filing of such an affidavit.

[3]*Viereck v. United States*, 318 U. S. 236, 87 L. Ed. 734.

[4]*Beck v. United States*, 33 F. (2d) 107, 114.

Conclusion.

The judgment should be reversed so that the appellant may be afforded an opportunity to have a fair trial—one free from the prejudicial impregnation of prejudice of the jury, resulting from the prosecutor's fluent but unfair tongue.

Respectfully submitted,

A. L. WIRIN and
J. B. TIETZ,
WAYNE M. COLLINS,
THEODORE TAMBA,
By A. L. WIRIN,
Attorneys for Appellant.

APPENDIX A.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Claibourne Randolph Tatum, appellant, vs. United States of America, appellee. No. 10616.

AFFIDAVIT OF A. L. WIRIN.

United States of America, State of California, County of Los Angeles—ss.

A. L. Wirin, being first duly sworn, deposes and says:

That he is one of the attorneys for the appellant; and the attorney who represented the defendant at the time of, and in the course of, the trial before a jury in the District Court below.

During the entire trial, including the arguments of counsel, a court reporter was present in the District Court.

The affiant assumed, from the practice in the United States District Court for the Southern District of California, to which District the affiant's practice is very largely confined, that said court reporter was taking notes of the arguments of counsel, as well as of the submission of evidence. After the conclusion of the trial, in connection with the preparation of a bill of exceptions, a request for a transcript of the entire proceedings having been made upon said reporter, the affiant learned for the first time that the court reporter had taken notes, so far as the oral arguments to the jury were concerned, only of the portions with respect to which exceptions were taken.

Prior to the time that the prosecutor made the statement, in the course of his oral argument, excepted to by the affiant, appearing in the Transcript of Record at page 50, said prosecutor, in the opinion of the affiant, made a number of prejudicial statements constituting an appeal to the passion and prejudice of the jury, but the affiant took no exception thereto; first, because he was conversant with the decision in *Viereck v. United States,* 318 U. S. 236; 87 L. ed. 734, holding that no exception is necessary where the prosecutor's argument is clearly prejudicial; and secondly, because the affiant felt that the jury would be influenced adversely to the defense if the affiant interrupted the prosecutor's argument. When the prosecutor's argument reached its peak in its emotionalism, however, and the prosecutor used the phrase, "the blood of the battlefield", the affiant then determined that the prosecutor's argument was so prejudicial as to warrant incurring the displeasure of the jury and requiring express exception on the part of the defendant. The affiant then interrupted the prosecutor, and made objection and exception on two occasions.

A. L. WIRIN.

Subscribed and sworn to before me this 10th day of July, 1944.

(Seal) J. B. TIETZ,
Notary Public in and for said County and State.

My commission expires Feb. 28, 1948.